FULCRUM CAPITAL SDN BHD

v.

DATO' SAMSUDIN ABU HASSAN; RAHAZ SDN BHD & ANOR (INTERVENERS) & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NOS: S5-22-119-1998 & D4-22-3748-1998]
26 OCTOBER 2000

CIVIL PROCEDURE: *Action - Application for leave to sell shares of company - Whether application should be granted in view of injunction obtained by opposite party*

CIVIL PROCEDURE: *Damages - Undertaking in damages - Fortification - Whether party should provide fortification for undertaking in damages*

CIVIL PROCEDURE: *Preliminary issue - Whether court could determine issue - Rules of the High Court 1980, O. 33 r. 2*

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings of trial of preliminary issue - Whether stay should be allowed in view of earlier consent by applicant to have preliminary issue tried by court*

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings pending appeal - Whether appeal rendered nugatory if stay disallowed - Whether nugatory approach must be viewed against earlier consent by applicant to have issue tried by court*

In this case, the 1st suit was consolidated with the 2nd suit to be heard together.

The facts were that the plaintiff had granted a loan facility of RM76,219,512 to the defendant ('Rahaz Sdn Bhd') in the 2nd suit. The defendant in the 1st suit ('Dato Samsudin') was the majority shareholder of Rahaz Sdn Bhd and had given a personal guarantee for the loan facility. Both defendants had, amongst others, pledged their shares of a company called Merbok Hilir Berhad as security for the loan facility. The full loan facility was disbursed and it was due and payable about a year later. However, before that was due, Rahaz Sdn Bhd sought to extend repayment of the loan facility for a further six months. The plaintiff agreed to the extension subject to two conditions being met, one of which was full settlement of interest owing to the plaintiff. Rahaz Sdn Bhd tendered part payments towards the said interest and informed the plaintiff that the balance of the interest was to be rolled over together with the principal sum for the further six months. The plaintiff replied and reiterated

that the extension for a further six months was only conditional upon full settlement of the said interest. When there was no response from Rahaz Sdn Bhd, the plaintiff commenced the actions against the defendants for the recovery of the loan. Dato Samsudin then obtained an injunction against the plaintiff from realising the securities under the loan facility pending the trial proper.

The issues for the court's determination were: (1) whether the plaintiff should be given leave to sell the shares of Merbok Hilir Berhad in view of the injunction obtained by Dato Samsudin; (2) whether Dato Samsudin should provide a fortification for his undertaking in damages pursuant to the injunction order; (3) whether a preliminary issue, *ie*, on whether there was a binding agreement between the parties for the roll over of the loan for a further six months could be determined by this court; and (4) whether the defendants' application for stay of the hearing of the preliminary issue should be allowed pending appeal.

Held:

[1] Once leave had been obtained by the plaintiff to sell the shares of Merbok Hilir Berhad, the question of contempt of the injunctive order no longer arose. The plaintiff had rightly sought leave to sell those shares and the court had no hesitation in granting the leave that was required.

[2] Where there is evidence of the inadequacy of the applicant's financial resources and there is substantial doubt as to whether the opposite party will be adequately protected by an undertaking given by the applicant, the court is empowered to order that either security be provided for the undertaking or a third party provide for that undertaking, with security if appropriate befitting the circumstances of the case.

[3] Dato Samsudin must fortify his undertaking as to damages which amounted to RM37.25 million. An empty undertaking as to damages would be worthless in the monetary sense. If Dato Samsudin was indeed in a healthy financial position as he made himself out to be, then there would not be any difficulty for him to fortify his undertaking as to damages.

[4] By virtue of O. 33 r. 2 RHC, the court certainly had the wide discretion to order the preliminary issue as framed to be tried even before the trial of the cause or matter. The preliminary issue as framed was partly of fact and partly of law and was not a fictitious question.

[5] A time saving device as envisaged by O. 33 r. 2 RHC must be resorted to and as such, the said preliminary issue as agreed by both parties should be heard by this court.

[6] On the defendants' application for stay of the preliminary issue to be tried, the defendants would not suffer any prejudice if it was not granted. To allow the stay, would bring about unnecessary delay to the hearing of the preliminary issue which would cause manifest injustice to the parties concerned. Further, the affidavit evidence in support of the stay did not demonstrate anything exceptional in character to warrant the stay.

[7] On whether the appeal against the hearing of the preliminary issue would be rendered nugatory if stay was not allowed, the nugatory approach must be viewed in the context of the consent by the defendants to have the preliminary issue tried by this court. It would be pointless to file an appeal against an event that was agreed upon by both parties.

[Order accordingly.]

Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***
Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(refd)***
Allen And Others v. Jambo Holdings Ltd & Ors [1980] 1 WLR 1252 ***(refd)***
Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 ***(refd)***
American Cyanamid v. Ethicon [1975] AC 396 ***(refd)***
Balogh v. Crown Court at St Albans [1975] QB73 86 ***(refd)***
Bank Bumiputra Malaysia Bhd v. Esah Binti Abdul Ghani [1986] 1 MLJ 16 ***(refd)***
Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd & Ors [1988] 1 MLJ 462 ***(refd)***
Bangkok Bank Ltd v. Cheng Lip Kwong [1990] 1 CLJ 1017 ***(refd)***
Beaumont v. Marquis of Salisbury [1854] 19 Beav 198 ***(refd)***
Bidang Cerdas Sdn Bhd v. Sayfol Management Sdn Bhd [1998] 2 CLJ Supp 7 ***(refd)***
Bright v. Tyndall [1876] 4 Ch D 189 ***(dist)***
Cavenagh v. Cohen [1919] 147 LT Jo 252 ***(refd)***
Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584 ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***
Commodity Ocean Transport Corporation v. Basford Unicorn Industries Ltd (The Mito) [1987] 2 Lloyd's Law Reports 197 ***(refd)***
Cropper v. Smith [1884] 26 Ch D 710-711 ***(refd)***
D & C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors [1990] 2 CLJ 58 ***(refd)***
Federal Insurance Co v. Nakano Singapore (Pte) Ltd [1992] 1 SLR 390 ***(refd)***
Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 ***(refd)***
GL Baker, Ltd v. Medway Building & Supplies, Ltd [1958] 1 WLR 1216 ***(refd)***
Government of Malaysia v. South East Asia Insurance Bhd [2000] 3 CLJ 705 ***(refd)***
*Huang Ee Hoe v. Tiong Thai King [1991] 1 MLJ 51****(refd)***
Inglis v. Commonwealth Trading Bank of Australia [1972] 126 CLR 161 ***(refd)***
Jones v. Pacaya Rubber and Produce Co., Ltd [1911] 1 KB 455 ***(refd)***
Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***
Kidder v. West [1684] 3 Lev 167 ***(refd)***
Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd [1995] 3 CLJ 812 ***(refd)***
Lakeman v. Mountstephen [1874] LR 7 HL 17 ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***
Lim Eng Kay v. Jaafar bin Mohamed Said [1982] 2 MLJ 156 ***(refd)***
Lister v. Cowdery [1900] 21 LR (NSW) Eq 4 ***(refd)***
Macleod v. Jones [1883] 24 Ch D 289 ***(refd)***
Malaysia Building Society Bhd v. Lim Kheng Kim & Ors [1988] 3 MLJ 175 ***(refd)***
Marc Rich & Co Pte Ltd v. Oroleum International Ltd [1987] MLJ clxxviii ***(refd)***
Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***
Monypenny v. Monypenny [1861] 9 HLC 114 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 3 MLJ 332 ***(refd)***
Puncak Klasik Sdn Bhd [1996] 4 MLJ 533 ***(refd)***
Radstock Co-operative And Industrial Society Ltd v. Norton-Radstock Urban District Council [1968] 1 Ch D 605 ***(refd)***
Re Alabama, New Orleans, Texas & Pacific Junction Railway Co [1891] 1 Ch 213 ***(refd)***
Re Dorman Long & Co Ltd [1934] Ch 635 ***(refd)***
Re NFU Development Trust Ltd [1973] 1 All ER 135 ***(refd)***
Re Prior, ex parte Bellanto [1963] SR NSW 190 ***(refd)***
Re Savoy Hotel Ltd [1981] Ch 351 ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***
Shaw v. Earl of Jersey [1879] 4 CPD 359 ***(refd)***
Smith v. Lucas [1881] 18 Ch D 531 ***(refd)***
Simpson v. Foxon [1907] P 54 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 2 MLJ 31 ***(refd)***
Sumner v. William Henderson & Sons [1963] 1 WLR 823 ***(dist)***
Third Chandris Shipping Corporation and Others v. Unimarine SA, The Pythia, The Angelic Wings, The Genie [1979] 2 All ER 972 ***(refd)***
Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd (No 2) [1993] 2 MLJ 353 ***(refd)***
Tynte v. Buller [1854] 23 LJ Ch 504 ***(refd)***
Union (V-Tex) Shirt Factory Ltd (In Liquidation) v. Union V-Tex Realty Ltd & Ors [1985] 2 HKC 617 ***(refd)***
Universal Cable (M) Bhd v. Bakti Arena Sdn Bhd & Ors [2000] 3 CLJ 375 ***(refd)***
Walsh v. Lonsdale [1882] 21 Ch D 9 ***(refd)***
Whitworth v. Rhodes [1850] 20 LJ Ch 105 ***(refd)***
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828 ***(refd)***
Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No 4) [1998] 4 CLJ Supp 319 ***(refd)***
Zainur Zakaria v. PP [2000] 4 AMR 4117 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176
Contracts Act 1950, s. 79
Rules of the High Court 1980, O. 33 rr. 2, 5

Other source(s) referred to:
Mareva Injunctions: Law and Practice, Steven Gee & Geraldine Mary Andrews, pp 56, 60
The Principles of Equitable Remedies, ICF Spry, 1990, 4th edn, p 475

For the plaintiff - M Pathmanathan (Dato' V Sivaparamjothi & Manjit Singh with him); M/s Sri Ram & Co
For the defendants - DR John; M/s Atma Singh Veriah & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Enclosure 44 (The Hearing On 2 August 2000)

This was an application by way of a summons in chambers by the plaintiff (Fulcrum Capital Sdn Bhd – hereinafter referred to as "Fulcrum") which came up for hearing on 2 August 2000 for the following orders:

(1) an order that the plaintiff be given leave to sell the shares of Merbok Hilir Berhad pledged by Rahaz Sdn Bhd to the defendant;

(2) alternatively, that Dato' Samsudin Abu Hassan do provide fortification for his undertaking as to damages pursuant to the order dated 16 December 1998 amounting to the value of the shares pledged as at the date of the order to be made herein;

(3) such further or other orders or directions be made or given as this Honourable Court deems fit; and

(4) the costs of and occasioned by this application be costs in the cause.

Enclosure 44 was supported by an affidavit affirmed by Lum Sing Fai on 15 February 2000 which was filed on 25 February 2000 as seen in encl. 43. Dato' Samsudin Abu Hassan affirmed an affidavit in reply styled as an affidavit in reply of the first defendant on 10 March 2000 and this was filed on the next day as seen in encl. 45. Lum Sing Fai affirmed an affidavit in reply on 27 March 2000 which was filed on the next day as seen in encl. 52. In response, Dato' Samsudin Abu Hassan affirmed an affidavit in reply on

9 May 2000 which was filed on 12 May 2000 and this can be seen in encl. 59. Lum Sing Fai then responded by filing another affidavit in reply on 16 June 2000 which incidentally was affirmed on the same date and this can clearly be seen in encl. 68. Other relevant affidavits that were referred to can be seen in encls. 69, 3, 6 and 8 in that order. Incidentally, there was a notice to refer to the other relevant affidavits and it would certainly be done in the course of this judgment.

At the outset when encl. 44 came up for hearing on 2 August 2000, Mr. M. Pathmanathan, learned counsel for Fulcrum, orally applied to amend prayer 1 of encl. 44 and Madam DR John for the defendants magnanimously agreed to it. The oral amendment of prayer (1) of encl. 44 reads as follows:

> (1) an order that the plaintiff be given leave to sell the shares of Merbok Hilir Berhad pledged by Rahaz Sdn Bhd and the first defendant.

For convenience, I shall henceforth refer the civil suit no: S5-22-119-1999 as "the Samsudin Action", while the civil suit no: D4-22-3748-1998 will be referred to as "the Rahaz Action". In the Samsudin Action, Fulcrum was the plaintiff while Dato' Samsudin Abu Hassan (hereinafter referred to as "Dato' Samsudin") was cited as the defendant. Rahaz Sdn Bhd and Redbridge Assets Ltd were added as interveners in the Samsudin Action. In the Rahaz Action, Fulcrum was the plaintiff while Rahaz Sdn Bhd was the defendant. There was affidavit evidence to show that on 28 April 1999, the Honourable Chief Judge of Malaya directed that the Samsudin Action be consolidated with the Rahaz Action.

I must also emphasise that the oral amendment of prayer (1) of encl. 44 brought into sharp focus the first defendant and this must, under the Samsudin Action, refer to no one else except Dato' Samsudin. In fact, Dato' Samsudin plays a prominent role in encl. 44.

There was affidavit evidence to show that Fulcrum is a licensed moneylender exempted from the provisions of the Moneylenders Act 1951, and in that capacity Fulcrum offered by letter dated 27 September 1996 to Rahaz Sdn Bhd a loan facility to the tune of RM76,219,512.00, which offer was duly accepted by Rahaz Sdn Bhd. The purpose of the loan facility was to:

> finance up to RM62,500,000 only of the balance of purchase price in a sale and purchase agreement signed on May 21, 1996 between Bafana Holding Limited and Landmarks Hotel and Realty Sdn Bhd.

It seemed that the board of directors of Rahaz Sdn Bhd had full knowledge of the loan facility as evidenced by an extract of its resolution dated 30 September 1996 as exhibited in exhibit marked "P4" of encl. 3 – which

was an affidavit affirmed by Soo Kim Wai on 20 April 1998. Dato' Samsudin held the majority share of Rahaz Sdn Bhd holding precisely 49,998 shares of RM1 each out of the issued capital of 50,000 shares. The full loan facility of RM76,219,512 was disbursed by Fulcrum to Rahaz Sdn Bhd in accordance to s. 4.07 of the facility agreement dated 9 October 1996 as reflected in exhibited "P3" of encl. 3. The facility agreement was signed between Rahaz Sdn Bhd, on the one part, and Fulcrum, on the other part. Fulcrum disbursed the full loan facility on or about 10 October 1996. The tenure of the loan facility was explained by s. 4.06 of the facility agreement to be:

> for a period not exceeding twelve (12) months from the date of first drawdown of the Facility and the Lender (referring to Fulcrum) may, at its sole and absolute discretion and subject to the availability of funds, grant such extension as the Lender (referring to Fulcrum) deems necessary to the whole or part of the Facility.

Section 7.02 of the facility agreement further stated that:

> Without prejudice to section 7.01 hereof, the Borrower (referring to Rahaz Sdn Bhd) hereby covenants and agrees that the Facility shall be repaid in one lump sum within twelve (12) months from the date of the first drawdown of the Facility or such extended date as the Lender (referring to Fulcrum) shall in its absolute discretion grant.

Now, since the full loan facility had been disbursed on or about 10 October 1996, that loan became due and payable on or about 9 October 1997. However, by letter dated 23 September 1997, Rahaz Sdn Bhd wrote to Fulcrum and sought to exetend the tenure of the loan facility for a further six months from 9 October 1997. Fulcrum was quite magnanimous and by letter dated 10 October 1997 agreed to extend the repayment of the loan facility for a further six months which would mature on 9 April 1998 subject to the following conditions (see exh. P8 of encl. 3):

(a) payment of the outstanding interest (calculated at 18% per annum upfront from 10 October 1996 to 9 October 1997) amounting to RM13,719,512;

(b) payment of the loan extension fee of RM625,000 or equivalent to 1% flat on the principal amount of RM62,500,000; and

(c) that the total sum of RM14,344,512 be paid within seven days from the date of the letter (calculation wise the payment should be made on 17 October 1997).

By letter dated 11 October 1997 (see exh. P9 of encl. 3), Rahaz Sdn Bhd through Dato' Samsudin, wrote to Fulcrum and requested for a deferment of the interest due to be paid by the end of October 1997. By letter dated

12 October 1997 (see exh. P10 of encl. 3), Rahaz Sdn Bhd paid Fulcrum a sum of RM1,500,000 *vide* cheque number CKB 966202 being part payment of RM14,344,512. By letter dated 18 November 1997 (see exh. P11 of encl. 3), Rahaz Sdn Bhd tendered a further sum of RM6,500,000 to Fulcrum being part payment of RM14,344,512 and Rahaz Sdn Bhd in that letter had the audacity to say:

> As agreed the balance of the interest is to be rolled-over, together with the principal, for a further period of 6 months expiring on 9 April 1998. We will try to make arrangement to repay part or the whole amount by early next year.
>
> You have also agreed that no legal action is to be taken against Rahaz Sdn Bhd upon payment of this RM6,500,000.00.
>
> Your indulgence on this matter is much appreciated. Kindly acknowledge receipt by signing the duplicate copy of this letter."

Fulcrum was, to say the least, displeased with the contents of Rahaz Sdn Bhd's letter as alluded to above and upon receipt of this offending letter Fulcrum acted swiftly by sending a letter dated 18 November 1997 (see exh. P12 of encl. 3) wherein Fulcrum refuted Rahaz Sdn Bhd's allegation and categorically stated that notwithstanding the part payment of interest amounting to RM6,500,000, a sum of RM6,344,512 was still due and owing as interest to Fulcrum and that until and unless the said sum was paid, Fulcrum would not be in a position to consider the request of Rahaz Sdn Bhd to extend the tenure of the loan facility to 9 April 1998. This was what Fulcrum said in their letter dated 18 November 1997:

> Thank you for your cheques (PBB 161794 and MBB577537) amounting to RM6,500,000.00 which we hereby acknowledge receipt.
>
> As you are aware, the balance interest owing to us (calculated up to October 9, 1997) after this payment is RM6,344,512.00. We wish to remind you that the rollover of your loan is CONDITIONAL upon full settlement of the interest owing as per our letter of extension dated October 10, 1997 which was duly accepted by yourselves.
>
> Please note that our management can only consider your request to rollover the balance interest together with the principal for a further six months to expire on April, 1998 upon clearance of the two cheques abovementioned. Notwithstanding the above, we have always reserved our rights to pursue any avenues available to us including but not limited to any legal action as long as the loan facility remains in default.

Fulcrum transmitted another letter to Rahaz Sdn Bhd and that letter was dated 4 December 1997 (see exh. P13 of encl. 3) and in that letter Fulcrum gave an ultimatum to Rahaz Sdn Bhd in these terms:

After due consideration, we regret to inform yourselves that we are unable to accommodate your request to roll over the balance interest owing to us (calculated up to October 9, 1997) of RM6,344,512.00.

As we have kindly deliberated the settlement of the interest owing for the past two months, we have no alternative but to give yourselves a final ultimatum to fully settle the interest owing. Ensuing that, we would appreciate a concrete and definite proposal from yourselves to resolve the matter soonest possible.

Kindly note that if we do not receive an acceptable proposal from you within seven (7) days from the date hereof, we will commence with the necessary actions to recover the interest owing and if required the entire loan amount owing to us.

Please acknowledge receipt by signing and returning to us the duplicate copy of this letter.

Rahaz Sdn Bhd did not respond to Fulcrum's letter dated 4 December 1997.

Messrs Iza Ng Yeoh & Kit, advocates and solicitors, by a letter dated 31 December 1997 wrote on behalf of Fulcrum to Rahaz Sdn Bhd and demanded Rahaz Sdn Bhd to pay the sum of RM71,838,012.31 with interest accruing from 1 January 1998 at the rate of 18% per annum until the date of full settlement and that letter can be seen in exh. P14 of encl. 3 and it was worded thus:

Our clients instruct us that pursuant to a Facility Agreement dated 9 October 1996, our clients had disbursed the amount of RM62,500,000.00 on 10 October 1996. The said facility together with interest accrued thereon was to be repaid within twelve (12) months of the date of first drawdown, that is, on or before 9 October 1997.

As you had failed to comply with the terms of extension stipulated by our clients vide their letter dated 10 October 1997 and defaulted in the payment of interest due and payable, our clients hereby cancel the above facility.

As at 31 December 1997, the outstanding balance of the above facility stands at RM71,838,012.31 with further interest accruing thereon at 18% per annum from 1 January 1998 until the date of full settlement.

TAKE NOTICE that our clients hereby require you forthwith to pay or cause to be paid to our clients the above said sum of RM71,838,012.31 plus interest accruing thereon together with our notice fee of RM575.00 within seven (7) days from the date hereof, failing which, legal proceedings to enforce and recover payment thereof will be taken against you without further reference.

Incidentally, the registered slip from Pos Malaysia Berhad evidencing posting of the letter dated 31 December 1997 was also exhibited in exh. P14 of encl. 3. Section 1.02 of the facility agreement sets out the securities for the loan facility in the following manner:

a It is hereby agreed that the Facility granted by the Lender (referring to Fulcrum) shall be secured by:

(a) the execution of this Agreement;

(b) the execution of a Memorandum of charge of Shares by each of the
b Pledgors;

(c) the execution of a Power of Attorney by each of the Pledgors; and

(d) the personal Guarantee of the Guarantor (referring to Dato' Samsudin).

and the Pledgors under the facility agreement would mean the following
c persons (see section 2.01 of the facility agreement):

(a) REDBRIDGE ASSETS LTD (Certificate of Incorporation No: 135846) a company incorporated on 13 December 1994 in the British Virgin Islands under the BVI International Business Companies Ordinance;

d (b) MOHD SALLEH B. YEOP ABDUL RAHMAN (NRIC No: 0581839) of No: 82, Jalan Keruing, Bukit Bandaraya, 59100 Kuala Lumpur);

(c) the Borrower (referring to Rahaz Sdn Bhd);

(d) DATO' SAMSUDIN ABU HASSAN (NRIC No: 4917676) of the
e Sanctuary, 15-5-4, Jalan Tinggian Tunku, Bukit Tunku, 50480 Kuala Lumpur;

(e) MOHD. AZAHARI BIN ABU KASSIM (NRIC No: 6996429) of No: 2, Jalan Dabus 11/2D, 40000 Shah Alam.

f It would be apparent that Dato' Samsudin stood as a guarantor and gave a personal guarantee for the loan facility of RM76,219,512 that was extended to Rahaz Sdn Bhd by Fulcrum. It was a good personal guarantee extended by Dato' Samsudin bearing in mind that he held the majority share of Rahaz Sdn Bhd. As a guarantor, Dato' Samsudin undertook and gave a collateral obligation to answer for the principal debtor's obligation in the event the
g principal debtor – in the present case Rahaz Sdn Bhd, were to make default. A contract of guarantee would therefore be dependent on there being a principal debtor who finally defaults and is liable (*Lakeman v. Mountstephen* [1874] LR 7 HL 17).

h Section 79 of the Contracts Act 1950 enacts as follows:

> A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of which default the guarantee is given is called the 'principal debtor', and the person to whom
> i the guarantee is given is called the 'creditor'. A guarantee may be either oral or written.

and it clearly spells out the meaning of a contract of guarantee. Lord Selborne in *Lakeman v. Mountstephen (supra)* aptly said:

> There can be no suretyship unless there is a principal debtor, who of course may be constituted in the course of the transaction by matters ex post facto and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

In *Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828, Holroyd Pearce LJ emphasised that a surety's liability is contingent upon the existence of a valid and subsisting debt due from the principal debtor to the creditor and this was what his Lordship said:

> Since a guarantee is by definition an obligation to answer for the debt, default or miscarriage of another, there cannot, in respect of a void contract, be any debt, default or miscarriage to answer for.

In the context of the present case, the existence of the facility agreement was not in dispute. It was also not disputed that the full loan facility of RM76,219,512 had been fully disbursed by Fulcrum to Rahaz Sdn Bhd. The contract of guarantee between the parties – at all material times, was valid and subsisting. There was default in repayment and so the guaranteed debt became due and payable and it was not open for Dato' Samsudin, as a guarantor, to demand that Fulcrum called upon Rahaz Sdn Bhd – the principal debtor, to pay off the debt. Indeed, Fulcrum was entitled to and was at liberty to proceed against the guarantor in the person of Dato' Samsudin. That would be the unfettered right of Fulcrum (*Bank Bumiputra Malaysia Bhd v. Esah Binti Abdul Ghani* [1986] 1 MLJ 16 SC). Bluntly put, as a guarantor Dato' Samsudin was answerable for the default of Rahaz Sdn Bhd.

Mr. M. Pathmanathan was perfectly right when he submitted that Dato' Samsudin and Rahaz Sdn Bhd had pledged their Merbok Hilir Berhad shares to Fulcrum for the loan facility of RM76,219,512 that was extended to Rahaz Sdn Bhd. In the context of encl. 44, Fulcrum's sole attention was confined to the Merbok Hilir Berhad shares and Mr. M. Pathmanathan rightly confined his well refined arguments to those shares only. Rahaz Sdn Bhd pledged 22.5 million shares of the Merbok Hilir Berhad while Dato' Samsudin pledged 6.75 million shares of the Merbok Hilir Berhad and together the grand total came up to a staggering 29.25 million shares.

It must be emphasised that Dato' Samsudin executed a personal guarantee dated 3 October 1996 as seen in exhibit marked "P15" of encl. 3 up to the limit of RM76,219,512 in favour of Fulcrum. Dato' Samsudin too executed the memorandum of charge of shares (exh. "P16" of encl. 3) and the power

of attorney (exh. "P17" of encl. 3) in favour of Fulcrum; and both these two documents were dated 9 October 1997. Dato' Samsudin gave his personal guarantee in this fashion:

> In consideration of you, at my request, having agreed to make or continuing to make available the term loan facility for the principal sum of Ringgit Malaysia Seventy Six Million Two Hundred Nineteen Thousand Five Hundred and Twelve (RM76,219,512.00) only ("Facility") or otherwise giving credit or accommodation now or at any time hereafter and for so long as you think fit to RAHAZ SDN BHD (Local No: 222838-V) a company incorporated in Malaysia and having its registered address at Box #28, 3rd Floor, Wisma SOCFIN, Jalan Semantan, 50490 Kuala Lumpur ("Borrower").

Clauses 22, 23, 24 (i) and (ii), 25, 26 and 27 of the personal guarantee should, by necessity, be reproduced hereinunder:

> 22. This Guarantee shall be valid and binding as against my heirs personal representatives and successors-in-title.
>
> 23. I agree that all costs and expenses (legal or otherwise and where legal both judicial and extra judicial on a solicitor and client basis) incurred or paid by you under this guarantee or for the collection or recovery of any moneys due or to become due hereunder shall be borne and paid for by me absolutely.
>
> 24. (i) This guarantee shall be interpreted and governed in accordance with the laws of Malaysia and I hereby irrevocably agree to submit to the exclusive jurisdiction of the Courts of Malaysia, and waive any objection to any legal actions or proceedings arising out of or in connection with this guarantee in any such court on the grounds of venue or on the grounds that such action or proceedings have been brought in an inconvenient forum.
>
> (ii) The service of any writ or summons or any legal process in respect of any such action or proceeding may be effected on the other party by forwarding a copy of the writ or summons or statement of claim or other legal process by prepaid registered post to their respective addresses in Malaysia hereinbefore stated or at such other address in Malaysia as such party may have notified in writing.
>
> 25. I confirm that I fully understand the legal implications and consequences of the same.
>
> 26. This guarantee shall be in addition to any previous guarantee(s) executed by me whether singly or jointly and is not in substitution for any other guarantee or security for the Borrower which you may now or hereafter hold from me.

27. If at any time any provision herein is or becomes illegal invalid or unenforceable in any respect, the remaining provisions herein shall in no way be affected or impaired thereby and this guarantee shall nevertheless remain valid and enforceable and binding as against me.

and I must give effect to them accordingly. The expressions used and the language employed in the personal guarantee must surely reflect the intention of Dato' Samsudin. In the words of Lord Wensleydale in *Monypenny v. Monypenny* [1861] 9 HLC 114 at p. 146:

> ... the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions.

In *Kidder v. West* [1684] 3 Lev 167, the following passage appeared:

> The court cannot understand the true intent of the indenture but only by the words of the indenture.

Sir Gorrell Barnes P in *Simpson v. Foxon* [1907] P. 54 at page 57 aptly said in the context of a testamentary suit:

> But what a man intends and the expression of his intention are two different things. He is bound and those who take after him are bound by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail.

Jessel M.R. in *Smith v. Lucas* [1881] 18 Ch D 531 at p. 542 said:

> One must consider the meaning of the words used, not what one may guess to be the intention of the parties.

Romilly M.R. had earlier on remarked in *Beaumont v. Marquis of Salisbury* [1854] 19 Beav. 198 at p. 206 that the "court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself."

Now, all these authorities would simply mean that I must construe the personal guarantee of Dato' Samsudin strictly according to the words employed by him so as to give effect to his intention which was to: personally guarantee the loan facility of RM76,219,512.00 extended by Fulcrum to Rahaz Sdn Bhd. But Rahaz Sdn Bhd defaulted in making the payment to Fulcrum. Through Messrs Iza Ng Yeoh & Kit, advocates and solicitors, Fulcrum demanded payment by way of a letter dated 13 January 1998 and that letter was worded as follows:

IZA NG YEOH & KIT

Your ref: 96-4/424/9/D-4
CERTIFICATE OF POSTING Date: 13 January 1998

Dato' Samsudin Abu Hassan
The Sanctuary, 15-5-4
Jalan Tinggian Tunku
Bukit Tunku
50480 KUALA LUMPUR

Dear Sirs

RAHAZ SDN. BHD. ['RAHAZ']
TERM LOAN OF RM76,219,512.00
REFERENCE NO. TL/165/09/96/12

We act for Fulcrum Capital Sdn. Bhd. of 1st Floor, Lot 271, Jalan Dua, Off Jalan Chan Sow Lin, 55200 Kuala Lumpur in the above matter.

TAKE NOTICE that Rahaz Sdn. Bhd. [Company No. 222838-V] of Box #28, 3rd Floor, Wisma SOCFIN, Jalan Semantan, 50490 Kuala Lumpur, for whom you became and are a guarantor to our clients under an agreement of guarantee in writing dated 3 October 1996, had made default in payment of the above account.

As at 31 December 1997, the outstanding balance of the above facility stands at RM71,838,012.31 with further interest accruing thereon at 18% per annum from 1 January 1998 until the date of full settlement.

Pursuant to the said agreement of guarantee, you agreed to guarantee and pay on demand all sums due and owing to our clients from the Borrower including interest up to a limit of RM76,219,512.00.

TAKE NOTICE that our clients hereby require you forthwith to pay or cause to be paid to our clients the abovesaid sum of RM71,838,012.31 plus interest accruing thereon together with our notice fee of RM575.00 within seven (7) days from the date hereof, failing which, legal proceedings to enforce and recover payment thereof will be taken against you without further notice.

Yours faithfully,

for IZA NG YEOH & KIT
Sgd. (Illegible).
ANGELINE NG

c.c. client [Attn: Cik Saadiah/Mr Francis Yong]

On 11 December 1997, Messrs Salleh Leong Azlan & Co, the external auditors of Fulcrum certified that Rahaz Sdn Bhd had committed an event of default under the terms of the facility agreement (see exhibit marked as "P19" of encl.

3). Later, on 31 December 1997, Fulcrum issued a statement of account showing clearly the indebtedness of Rahaz Sdn Bhd (see exh. "P20" of encl. 3). Section 11.15 of the facility agreement speaks of conclusive evidence and it is worded as follows:

> A statement, notice or certificate as to the Indebtedness or any amount from time to time due and or payable by the Borrower to the Lender which is certified as being true and or correct by the Lender or any of its officers shall be conclusive evidence that the Indebtedness or such amount so certified, as the case may be, is in fact due and or payable and binding on the Borrower save and except for any manifest error or where fraud is proven.

In *Universal Cable (M) Bhd v. Bakti Arena Sdn Bhd & Ors* [2000] 3 CLJ 375, 401, the court said:

> In *Bank Bumiputra Malaysia Bhd v. Perbadanan Kemajuan Negeri Perak* [1989] 1 MLJ 502, Malek Ahmad J (now FCJ) spoke of a conclusive evidence clause in a guarantee by referring to two authorities and this was what his Lordship said at p. 503 to p. 504 of the report:
>
> > It is relevant at this point to refer to *Dobbs v. The National Bank of Australasia Ltd* [1935] 53 CLR 643. In that case, a clause in a guarantee given to a bank provided that a certificate signed by the manager of the office at which the principal debtor's account was kept should be conclusive evidence of his indebtedness at a particular date. It was held that the clause was not contrary to public policy as ousting the jurisdiction of the court and was therefore not void and that a certificate given pursuant to that clause was conclusive upon the parties of the amount and existence of the principal debtor's indebtedness.
> >
> > In *Bache & Co. (London) Ltd v. Banque Vernes Et Commerciale De Paris SA* [1973] 2 Lloyd's Rep 437, the plaintiffs, commodity brokers on the London Commodity Exchange, demanded a bank guarantee before entering into buying and selling transactions on behalf of their customer, a French trading company. The defendants, who were the trading company's bankers, gave the guarantee which contained a conclusive evidence clause providing that the amount stated in the notice of default shall be conclusive evidence of the amount claimed. Lord Denning MR stated in his judgment that 'this commercial practice of inserting conclusive evidence clauses is only acceptable because the bankers or brokers who insert them are known to be honest and reliable men of business who are most unlikely to make a mistake. Their standing is so high that their word is to be trusted so much so that a notice of default given by a bank or a broker must be honoured.
>
> and in the context of the present appeal, the conclusive evidence clause appeared at cl. 4 of the guarantee and indemnity and when read with the demand notices that itemized the extent of both the second and the third defendants' liabilities, it clearly showed the amount and the existence of the first defendant – the principal debtor's indebtedness.

By way of an analogy reference may be made to the case of *Government of Malaysia v. South East Asia Insurance Bhd* [2000] 3 MLJ 625, a decision of the Federal Court. There the appellant argued that the performance bond was an on demand bond and not a conditional one as found by the court of Appeal; while the respondent argued that as the performance bond was a guarantee, then proof of damage and not mere assertion thereof was required before liability under the performance bond arose. The Federal Court was of the view that on demand must be construed payable on demand without any question whatsoever. Mohamed Dzaiddin FCJ delivering the judgment of the Federal Court had this to say at p. 631 of the report:

> The material part of para 2 of the Gerenti Perlaksanaan reads:
>
> > The guarantor shall pay damages to the Government a sum not exceeding RM420,645 within three months **upon receipt of a written notice demanding that the guarantor pays the Government or any breach of the contract's obligations under the contract**, …. (Emphasis added.)
>
> In construing the above para, we would adopt the approach taken by Lord Justice Ackner (as he then was) in Esal, p 550. There are three possible meanings which can be given to the above paragraph. First, no more than a mere written demand is required. Secondly, the demand must assert a failure to perform the contract. Thirdly, because of the word 'damages', proof thereof and not mere assertion is required before liability under the bond arises. In our view, the second possibility is the answer because in addition to the demand made, the paragraph requires the Government to state the breach of the contractor's obligations under the contract.

and in the context of encl. 44, the letter of demand dated 13 January 1998 as reproduced earlier spoke of the default on the part of Rahaz Sdn Bhd to make payment of the loan facility of RM76,219,512.00 and the need on the part of Dato' Samsudin, as a personal guarantor, to pay on demand all sums due and owing to Fulcrum from Rahaz Sdn Bhd together with interest thereof. The sting of the conclusive evidence clause as seen in s. 11.15 of the facility agreement can never be doubted. In *Citibank NA v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282, the Federal Court held that the guarantors were bound by the contract to accept a certificate issued by a bank officer as conclusive in regard to the liabilities for the time being due to the bank by the customers. In *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 3 MLJ 175, there was cl. 4 of the guarantee which expressly provided that any admission or acknowledgement in writing by the borrower or any statement of account by the society certified correct by any of its managers or duly authorized officers shall be binding and conclusive evidence against the guarantors of the amount for the time being due to the society from the borrowers and the court gave effect to it. I must at once say that the courts

have consistently held that the existence in the guarantee document of the conclusive evidence clause, would preclude the guarantor from denying his liability for the amount claimed by the creditor. In the commercial world, the conclusive evidence clause would invariably be incorporated to encourage the lenders to lend money to the borrowers – who are usually honourable in character and who would be expected to honour any notice of demand promptly. Yong Pung How J in *Bangkok Bank Ltd v. Cheng Lip Kwong* [1990] 2 MLJ 5 explained the conclusive evidence clause in this way (see p. 8 of the report):

> The fact is that in business and commerce, there are many instances when provisions are inserted into contracts by which the contracting parties agree that a designated person will have the power to issue a certificate as evidence of a fact, and the issue by him of the certificate is then conclusive evidence of that fact, as between the parties. In the case of banks, there is nothing to prevent them recovering from a customer by leading evidence in court in the normal way to prove the actual indebtedness to them of the customer. They can then recover in full what is owing to them without the production of any certificate. But banks have huge numbers of customers, and over the years a practice has been developed and adopted by all banks by which a 'conclusive evidence' clause is inserted in all loan documentation. This enables the bank to produce a certificate by a designated officer to dispense with such proof, and to be conclusive evidence of the indebtedness of the customer.

In *Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd & Ors* [1988] 1 MLJ 462, Peh Swee Chin J (as he then was) gave credence to the conclusive evidence clause in these words (see p. 463 of the report):

> Arguing for the guarantor, learned counsel submitted that no account for the money due was supplied, and the bank was therefore put to strict proof. Leave should be granted for the case to go for trial.
>
> The short answer was that by clause 6 of the relevant letter of guarantee, any account stated by the bank and duly certified by any of the bank's officers would have to be treated by the guarantor as conclusive.

VC George J (as he then was) in *D & C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors* [1990] 2 CLJ 58 also added mileage to the conclusive evidence clause when his Lordship said (see p. 60 of the report):

> Section 4.01 provides that the guarantee will be in addition to other security and by s.7.04 it was agreed that a certificate of indebtedness by an authorised officer of the plaintiff shall be binding and conclusive against the guarantors of the amount payable by the 1st defendant.
>
> In the instant case there is such a certificate of indebtedness under the hand of an authorized officer of the plaintiff s bank.

But a caveat must be placed. The certificate of indebtedness can be challenged in these ways:

(1) According to VC George JC (as he then was) in *D & C Nomura Merchant Bankers Bhd v. Gunung Kuari Sdn Bhd & Ors (supra)* at p. 60 by showing an "error on the statement of accounts or in the certificate of indebtedness."

(2) According to *Bangkok Bank Ltd v. Cheng Lip Kwong (supra)* at p. 8 thereof that:

> What is significant is that, in the absence of fraud or obvious error on the face of it, a certificate issued under a 'conclusive evidence' clause is conclusive of both the liability and the amount of the debt" – per Yong Pung How J.

I will now proceed to the narrative of encl. 43.

The amended prayer (1) of encl. 44 was an application by Fulcrum for leave to sell the shares of Merbok Hilir Berhad pledged by Rahaz Sdn Bhd and Dato' Samsudin. Why was there a need for Fulcrum to obtain leave of this court to sell those shares? For this exercise, I must refer to the injunction which Dato' Samsudin obtained on 16 December 1998 to restrain Fulcrum from howsoever whether it be by their directors, officers, servants and/or agents or otherwise from selling, disposing or dealing with the securities provided for the term loan facility granted to Rahaz Sdn Bhd by way of a facility agreement dated 9 October 1996 (see exh. P3 of encl. 3), until the hearing of the Samsudin Action. The securities that were restrained by the injunction were:

(i) First party pledge of 22,500,000 shares of Merbok Hilir Bhd together with the duly executed blank transfer forms in favour of Fulcrum or its nominees;

(ii) Third party pledge of 6,750,000 shares of Merbok Hilir Bhd together with the duly executed blank transfer forms in favour of Fulcrum and/or its nominees;

(iii) Third party pledge of 65,000,000 shares of SMG Holdings Limited – company incorporated in the Republic of South Africa together with the duly executed blank transfer forms in favour of Fulcrum and/or its nominees;

(iv) Pledge of the entire paid up capital of Rahaz Sdn Bhd together with the duly executed blank transfer forms in favour of Fulcrum and/or its nominees;

(v) Memorandum of charge and the Power of Attorney in favour of Fulcrum to deal with the shares in (i), (ii), (iii) and (iv) above; and

(vi) The personal guarantee of Dato' Samsudin.

After James Foong J heard the arguments from counsel acting for Fulcrum and Dato' Samsudin on 16 June 1998 (see the rectification at para. 8.1 of encl. 52), his Lordship granted the injunction forthwith. James Foong J too after granting the injunction made an order for an early date to be set for the trial of the Samsudin Action. At the hearing of Dato' Samsudin's application for the injunction on 16 June 1998 (see the rectification at para. 8.1 of encl. 52), James Foong J granted the injunction on the basis that an early date would be set for the trial of the Samsudin Action. Dates were then set by James Foong J for the trial of the Samsudin Action on 1 June 1999 and 2 June 1999. As alluded to earlier, the Honourable Chief Judge of Malaya had, on 28 April 1999, ordered the consolidation of the Samsudin Action with that of the Rahaz Action. However, on 1 June 1999 and 2 June 1999, James Foong J was not available and the matter was then fixed for case management in the month of April 1999.

By notice dated 26 October 1999, at my behest, the senior assistant registrar ("SAR") informed the solicitors acting for the parties in the Samsudin Action and the Rahaz Action that both the actions had been set down for the fixing of the trial dates which fixing was scheduled to be heard on 1 November 1999. The notice issued by the SAR required all counsel having conduct of both the actions to attend court with their respective diaries on 1 November 1999. On that date (1 November 1999), all counsel having conduct of both the actions attended court and trial dates for both actions – the Samsudin Action and the Rahaz Action, were fixed from 17 April 2000 to 21 April 2000. But on 20 December 1999, the defendants' solicitors in both the actions wrote to this court and requested an adjournment of the trial dates fixed from 17 April 2000 to 21 April 2000 on the ground that the defendants' counsel by the name of Dato Dr. Cyrus Das was involved in a continued hearing in the Malacca High Court. Of course, Fulcrum's solicitors vehemently objected to the adjournment; but after hearing both parties on 29 December 1999, I allowed the adjournment and fixed the trial of both the actions from 20 November to 24 November 2000 and spilling over to 27 November 2000 until 30 November 2000. It was averred that after having obtained the injunction, it was incumbent on the part of the defendants to proceed expeditiously to have both the actions tried. It was also averred that instead of expediting the trial of both the actions, the defendants have delayed the same by applying to adjourn the trial dates that were scheduled from 17 April 2000 to 21 April 2000. It was averred that the injunction had caused Fulcrum to suffer the loss of being unable to deal with the securities provided to

Fulcrum to enable it to recover the amounts that were due and owing from Rahaz Sdn Bhd to Fulcrum. It was averred that subsequent to the injunction being granted, the trading of the SMG Holdings Limited shares had been suspended and as a result thereof Fulcrum lost the right to sell the shares until the suspension was lifted. It was averred that from the conduct of the defendants it was apparent that they will continue to delay or attempt to delay the trial of both the actions. Such delays, so it was averred, would cause Fulcrum to suffer irreparable loss as Fulcrum will lose the opportunity to sell the pledged shares expeditiously in order to recover the amount that was due and owing from Rahaz Sdn Bhd. It was also averred that Fulcrum was currently undergoing a re-structuring pursuant to s. 176 of the Companies Act 1965 and that re-structuring was said to be hampered not only by Fulcrum's inability to recover the monies owed by Rahaz Sdn Bhd but also by Fulcrum's inability to sell the pledged securities. All these were said to have caused irreparable harm to Fulcrum which could not be compensated by damages; and these averments can be seen in encl. 43.

Dato' Samsudin responded by filing an affidavit in encl. 45 and there he described himself as a chartered management accountant by qualification and he too held himself out to be a director of several companies including Khidmas Properties Sdn Bhd. Dato' Samsudin also averred that he deposed to the facts which were within his personal knowledge and also based on documents in his possession as well as in the possession of Rahaz Sdn Bhd save and except where it was stated otherwise. Dato' Samsudin also averred that he was duly authorized to affirm the affidavit in encl. 45 on behalf of Rahaz Sdn Bhd and Redbridge Assets Ltd – the interveners in the Samsudin Action. Dato' Samsudin also adverted to the writ and the statement of claim filed by Fulcrum in the Samsudin Action and likewise referred to the writ and the statement of claim in the Rahaz Action which was filed by Fulcrum. Dato' Samsudin too referred to encls. 44 and 43 before he went to the heart of the matter. The injunction order dated 16 December 1998 that was issued by James Foong J was exhibited and marked as exh. "SAH 1" of encl. 45 and flowing from that Dato' Samsudin averred that he was advised by his solicitors and he verily believed that upon the application of Fulcrum for an adjournment of the hearing of his application for an interim injunction in encl. 7 and the applications of the proposed interveners (Rahaz Sdn Bhd and Redbridge Assets Ltd) in the Samsudin Action which were all scheduled for hearing on 28 May 1998, James Foong J ordered that the hearing of the aforesaid applications be adjourned to 24 June 1998 and that until the hearing of the said applications on 24 June 1998 an interim injunction be granted against Fulcrum. Dato' Samsudin also averred that he was advised by his solicitors and he verily believed that the hearings of encls. 7, 12, and 15 on 24 June 1998 were adjourned to 18 September 1998 on Fulcrum's application. It was averred that at the request of Dato' Samsudin the hearings of the

applications in encls. 7, 12, and 15 were adjourned to 6 October 1998 wherein on that date James Foong J directed the parties to put in their written submissions and the aforesaid applications were then fixed for decision on 16 December 1998. It was on that date – referring to 16 December 1998, that James Foong J granted Dato' Samsudin the interim injunction and his Lordship too granted an order in terms of encls. 12 and 15 and his Lordship also dismissed Fulcrum's application for summary judgment as seen in encl. 4. It was averred that James Foong J then fixed the matter for hearing on 1 June 1999 and 2 June 1999 and his Lordship also fixed the date for case management on 19 April 1999.

Dato' Samsudin averred that it was not true that the interim injunction was granted on 24 June 1998 and it was the stand of Dato' Samsudin that the interim injunction was granted on 28 May 1998. It would be germane, at this juncture, to reproduce the order of James Foong J that was made on 16 December 1998 and that order, *inter alia*, reads as follows:

> **MAKA ADALAH DIPERINTAH** bahawa injunksi interim yang diberi terhadap Plaintif pada 28 haribulan Mei 1998 yang telah dilanjutkan kepada 24 haribulan Jun 1998 sehingga 18 haribulan September 1998 dan dilanjutkan sehingga 16 haribulan Disember 1998 bahawa Plaintif ditahan sehingga perbicaraan tindakan ini sama ada pengarah-pengarah dan/atau agen-agen mereka dari menjual, melupuskan atau berurusan dengan sekuriti-sekuriti yang diperuntukkan untuk pinjaman kemudahan masa yang diberi kepada Rahaz Sdn Bhd melalui Perjanjian Kemudahan bertarikh 09.10.1996 iaitu:
>
> (i) Gadaian Parti Pertama (First Party Pledge) bagi 22,500,000 saham di Merbok Hilir Bhd termasuk dengan borang-borang pindahmilik yang ditandatangani bagi faedah pihak Plaintif dan/atau wakilnya;
>
> (ii) Gadaian Parti Ketiga (Third Party Pledge) bagi 6,750,000 di Merbok Hilir Bhd termasuk dengan borang-borang pindahmilik yang ditandatangani bagi faedah pihak Plaintif dan/atau wakilnya;
>
> (iii) Gadaian Parti Ketiga (Third Party Pledge) bagi 6,750,000 di SMG Holdings Limited, sebuah syarikat yang ditubuhkan di Republik Afrika Selatan termasuk dengan borang-borang pindahmilik yang ditandatangan bagi faedah pihak Plaintif dan/atau wakilnya;
>
> (iv) Gadaian (Pledge) satu cagaran bagi keseluruhan modal terbayar (paid up capital) bagi Rahaz Sdn Bhd termasuk dengan borang-borang pindahmilik yang ditandatangan bagi faedah pihak Plaintif dan/atau wakilnya;
>
> (v) Memorandum gadaian dan surat kuasa wakil (power of attorney) bagi pihak Plaintif untuk berurusan dengan saham – saham di (i), (ii), (iii) dan (iv) di atas; dan
>
> (vi) Jaminan peribadi oleh Defendan.

dilanjutkan lagi sehingga perbicaraan tindakan ini **DAN ADALAH JUGA DIPERINTAHKAN** bahawa kos dijadikan kos dalam kausa.

Bertarikh pada 16 haribulan Disember 1998,

t.t. (Illegible).
Timbalan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

and both parties were correct as to the status of the interim injunction. It was next averred that James Foong J did not make an order for an early trial of the Samsudin Action on 24 June 1998. It was also averred that it was not true that the injunction order was granted on the basis that an early trial date would be set for the trial of both the actions. Dato' Samsudin averred that the Rahaz Action was commenced by Fulcrum on 9 October 1998 and it was served on Rahaz Sdn Bhd on 14 October 1999; and that being the case it was averred that the Rahaz Action was not even considered in the Samsudin Action. It was averred that the defendant in the Rahaz Action had applied in the Samsudin Action to intervene and be made a defendant in the Samsudin Action and this was done by way of a summons in chamber's application as reflected in encl. 12. Indeed James Foong J in his unreported judgment exhibited in exhibit "LSF 1" of encl. 43 alluded to these facts.

In the meantime, so it was deposed, that Fulcrum in the Rahaz Action had filed an application for summary judgment which was fixed for hearing on 30 December 1998 but it was adjourned to 3 February 1999 at the request of the defendant's solicitors since the solicitors having conduct of the case was on leave and required time to file the affidavit in reply. In the meantime, Fulcrum in the Samsudin Action filed an appeal against the injunction that was granted on 16 December 1998. That appeal was filed on 7 January 1999; and the appeal record together with the memorandum of appeal was filed in the Court of Appeal on 3 June 1999. Not to be outwitted, the defendant in the Rahaz Action filed an application for a stay of the proceedings and that application for a stay was scheduled to be heard on 3 February 1999. Next, it was averred that since the Samsudin Action and the Rahaz Action were related to the same subject matter and in order to avoid duplicity of proceedings; the defendant in the Rahaz Action applied to the court to consolidate the Rahaz Action with that of the Samsudin Action. It was averred that the defendant's application for a stay in the Rahaz Action and Fulcrum's summary judgment application in the Rahaz Action were adjourned to 6 May 1999. Dato' Samsudin also averred to the following set of facts:

(a) that Fulcrum's solicitors in the Rahaz Action by letter dated 3 February 1999 wrote to the defendant's solicitors enquiring whether the application for stay was filed under a certificate of urgency;

(b) that the defendant's solicitors in the Rahaz Action had replied by letter dated 3 February 1999 conveying the message that the application was filed under a certificate of urgency;

(c) that Fulcrum's solicitors in the Rahaz Action then applied to the Honourable Chief Judge of Malaya for the Rahaz Action to be consolidated with the Samsudin Action;

(d) on 19 April 1999 when the Samsudin Action came up for case management, James Foong J adjourned the matter pending the outcome of the application for consolidation which matter was fixed for hearing on 28 April 1999; and

(e) by letter dated 28 April 1999, the Honourable Chief Judge of Malaya directed that the Rahaz Action be consolidated with the Samsudin Action.

Dato' Samsudin admitted paras. 7 and 8 of Fulcrum's affidavit in support as seen in encl. 43. Dato' Samsudin too admitted para. 9 of encl. 43 and he ventured to say upon being advised by his solicitors that the reason for the adjournment of the trial scheduled for 17 April 2000 to 21 April 2000 was because Dato' Dr. Cyrus Das who was counsel of his choice was required to proceed with the continued hearing of a case in the Malacca High Court since the judicial commissioner in the Malacca case had been transferred to Kuala Lumpur and he wanted to complete and dispose off his part heard case in Malacca. Dato' Samsudin took exception to para. 10 of encl. 43 wherein Fulcrum alleged that the defendants had delayed the expeditious trial of both the actions by applying for adjournments and Dato' Samsudin was advised by his solicitors and he verily believed that those statements were mischievous and misleading for the following reasons:

(a) when the matter was called up on 1 November 1999 to fix a hearing date for both the actions which had been consolidated, Fulcrum's appeal in the Samsudin Action was still pending in the Court of Appeal;

(b) that Fulcrum had not taken the necessary steps to file the summons for directions;

(c) that it was only on 1 November 1999 that I had fixed the hearing of both the actions from 17 April 2000 to 21 April 2000 whereupon Fulcrum's solicitors undertook to withdraw the appeal and proceeded to file the application for summons for directions;

(d) when Dato' Samsudin's solicitors requested for the adjournment due to the non-availability of his counsel of his own choice as alluded to above, both the actions were called up on 28 December 1999 wherein fresh dates were allotted in November 2000 – to be precise between 20 November 2000 to 24 November 2000 and followed by 27 November 2000 to 30 November 2000;

(e) Fulcrum's solicitors were reminded that they had yet to withdraw the appeal and Fulcrum's solicitors then undertook to do so before the hearing of the summons for directions;

(f) that Fulcrum's solicitors in the Samsudin Action by the name of Messrs Iza Yeoh Ng & Kit served the summons for directions on Dato' Samsudin's solicitors on 2 February 2000;

(g) that Fulcrum's solicitors wrote and enquired from Dato' Samsudin's solicitors whether the appeal would be withdrawn without any order as to costs and pending further instructions Dato' Samsudin's solicitors then requested that the hearing of the summons for directions which was scheduled for hearing on 7 March 2000 be adjourned to a new date; and

(h) that Dato' Samsudin had just returned from overseas and accordingly he had instructed his solicitors not to agree to the appeal being withdrawn with no order as to costs; and in the meantime the summons for directions have been fixed for hearing on 28 March 2000.

Dato' Samsudin proceeded to aver that he was advised by his solicitors and he verily believed that it was Fulcrum who had been dragging its feet in getting both the actions ready for trial and who was more interested in avoiding paying the costs for the withdrawal of the appeal bearing mind that the summons for directions cannot be heard until the appeal was withdrawn. Dato' Samsudin also averred that it had taken Fulcrum more than a year to decide whether to proceed with the civil suit or the appeal, and for this purpose the letter from Messrs Atma Singh Veriah & Co., solicitors for Dato' Samsudin dated 4 June 1999 (marked as exh. "SAH2" of encl. 45) and the reply from Messrs Sri Ram & Co, solicitors for Fulcrum dated 9 June 1999 (marked as exh. "SAH3" of encl. 45) were highlighted. The letter from Messrs Atma Singh Veriah & Co. was worded as follows:

> We refer to the above matter and write now to seek a clarification from you as to whether the plaintiff is pursuing the Appeal to the Court of Appeal since the plaintiff is also at the same time pursuing the matter before Yang Arif Dato' James Foong and has requested for a fresh case mention date for case management.

Kindly let us know the status of the same in order for us to instruct our clients.

While the letter from Messrs Sri Ram & Co. was worded in this fashion:

We refer to the above matters and to your letter of 4th June 1999.

We write as counsel in the Kuala Lumpur High Court Civil Suit No: S5-22-119-98. We are instructed by our client to have the matters fixed for trial. Until such time that the trial proper commences, our appeal to the Court of Appeal shall be maintained.

Dato' Samsudin was advised by his solicitors to say that Fulcrum had even failed to amend the writ to the Samsudin Action to reflect the addition of the interveners as the second and third defendants pursuant to the order of the court dated 16 December 1998 and this was also alluded to by James Foong J in his unreported judgment. It was averred that any alleged loss which Fulcrum purported to have suffered, which was denied, was solely caused by Fulcrum in failing to elect which course of action Fulcrum was going to pursue. It was averred that the interveners in the Samsudin Action together with Dato' Samsudin who have suffered loss and continue to suffer loss by the sale of the SMG Holdings Limited shares prior to its suspension. Dato' Samsudin categorically denied that Fulcrum was suffering irreparable harm for which Fulcrum cannot be compensated in damages. Dato' Samsudin averred that he and the interveners suffered loss and damage and the fact that Fulcrum was undergoing a restructuring exercise gave no assurance that Fulcrum was able to pay the damages that were due to Dato' Samsudin and the interveners. It was averred that Fulcrum had no right to sell the SMG Holdings Limited shares or for that matter any other shares as the injunction dated 16 December 1998 clearly restrained Fulcrum from doing so. It was said that the injunction order was binding on all parties until it was set aside. Dato' Samsudin averred that Fulcrum had been guilty of delay in pursuing its claim and was now blaming him and the interveners for its lack of action. It was also averred that Fulcrum was undergoing re-structuring pursuant to action 176 of the Companies Act 1965 due principally to its mismanagement. Dato' Samsudin averred that the interveners and himself have a valid defence based on the merits to Fulcrum's claim and the issue of liability to pay, if any, was to be determined by this court at the full trial. In the interim period, so the averment went, James Foong J had found that there were issues to be tried which merited the granting of the interim injunction in order to maintain the status quo. It was averred that Fulcrum had breached the contract by unlawfully terminating and recalling the term loan facility granted to Rahaz Sdn Bhd in the Rahaz Action. It was averred that Fulcrum's application in encl. 44 amounted to a contempt of court of the order of James Foong J dated 16 December 1998 and that encl. 44 was a desperate attempt by Fulcrum to

circumvent the effect of James Foong J's order and in the process thereof Fulcrum overlooked its own breach of the contract. For these reasons, Dato' Samsudin prayed that Fulcrum's application in encl. 44 be dismissed with costs.

Lum Sing Fai by way of encl. 52 responded to encl. 45. Lum Sing Fai sought in encl. 52 to set out the facts in a chronological order and this was his version of the facts:

(1) That Dato' Samsudin's application for an injunction came up for hearing on 28 May 1998 and it was then adjourned to 24 June 1998. James Foong J had on 28 May 28, 1998 granted an interim injunction to preserve the status quo until the hearing of the application for the injunction.

(2) On 24 June 1998, the matter was once again adjourned as Dato' Samsudin had just filed certain affidavits which Fulcrum needed to reply. James Foong J continued to grant the interim injunction with certain variations to the injunction that was granted on 28 May 1998 and his Lordship then adjourned the matter to 18 September 1998. It was on this date that the parties were directed to put in written submissions. Fulcrum's solicitors had no record of the hearing that took place on 6 October 1998. James Foong J then fixed the matter for decision on 16 December 1998.

(3) James Foong J had on 16 December 1998 allowed Dato' Samsudin's application for an injunction and his Lordship also proceeded to dismiss Fulcrum's application for summary judgment and ordered an early trial of the matter. His Lordship also fixed the trial of the action on 1 June 1999 and 2 June 1999 respectively. His Lordship also fixed the matter for case management on 9 April 1999.

(4) But, on 9 April 1999, James Foong J vacated the dates that were originally fixed for the trial of the action as his Lordship was not available on those dates.

(5) The court issued a notice dated 26 October 1999 requiring counsel having conduct of both the actions to attend court with their respective diaries on 1 November 1999 so that the court could fix the trial dates for the case.

(6) As scheduled, on 1 November 1999, counsel for both parties attended court wherein the dates for the hearing of both the actions were fixed from 17 April 2000 to 21 April 2000.

(7) Unfortunately, on 20 December 1999, Dato' Samsudin's solicitors requested for an adjournment of the trial dates. On 29 December 1999, the court allowed Dato' Samsudin's request and adjourned the trial to the following dates: from 20 November 2000 to 24 November 2000 and from 27 November 2000 to 30 November 2000.

Lum Sing Fai was advised by his solicitors and he verily believed that the interim injunction granted on 24 June 1998 was without prejudice to Fulcrum to raise all the arguments in opposing the application for an injunction. Lum Sing Fai then proceeded to rebut paragraph by paragraph of Dato' Samsudin's affidavit in encl. 45 and they were averred on the advice of Lum Sing Fai's solicitors. Of pertinence would be the averments that the interim injunction that was granted on 28 May 1998 was extended with certain variations on 24 June 1998 and they were merely holding over orders to preserve the status quo until the hearing of Dato' Samsudin's application for an injunction. It was averred that James Foong J ordered an early trial upon granting the injunction on 16 December1998 and, in so doing, his Lordship must have taken into account the prejudice that Fulcrum may suffer as a result of the injunction. Lum Sing Fai was advised by his solicitors and he verily believed that the trial dates in April 2000 were fixed on 1 November 1999 in accordance with the dates suitable to counsel for both parties. But, so it was averred, about one month later and this was on or about 20 December 1999, Dato' Samsudin requested for an adjournment of the trial dates on the ground that those dates were no longer suitable to his counsel of his own choice. It was averred that having initially agreed to the trial dates, Dato' Samsudin was merely delaying the action by seeking postponements. It was Lum Sing Fai's averments that since the pleadings have been closed, it was entirely open to Fulcrum to proceed to obtain the necessary directions for the trial of both the actions. It was averred that the defendants in both the actions have failed to show any evidence to suggest that the defendants would be able to pay damages to Fulcrum in the event the latter succeeds in the course of the trial of these actions. Lum Sing Fai categorically averred that Rahaz Sdn Bhd had incurred a loss of RM17,210,617 for the financial year ending 31 December 1998. It was averred that the defendants' allegations that Fulcrum would not be able to pay the defendants' damages was entirely irrelevant as it was the defendants who have obtained an injunction against Fulcrum. To round it up, Lum Sing Fai deposed that the matters as alluded to in encl. 45 which were not specifically addressed were denied.

Dato' Samsudin responded to encl. 52 by way of an affidavit in reply as reflected in encl. 59. The bulk of the averments in encl. 59 revolved on the trial dates that were granted and later vacated; it also focused on the injunctive order issued by James Foong J Dato' Samsudin averred that upon reading the

judgment of James Foong J, it was apparent that his Lordship had granted the interim injunction and dismissed Fulcrum's application for summary judgment since there were triable issues. It was also averred that the granting of an early trial date by James Foong J did not in any way show that his Lordship had implied that there was prejudice to Fulcrum by the existence of the injunctive order. Dato' Samsudin denied that he was delaying the trial of both the actions. Of pertinence would be Dato' Samsudin's averments to the effect that Rahaz Sdn Bhd is in a healthy position having RM35 million worth of assets after taking into account the loss of RM17,373,682. Dato' Samsudin also averred that the losses sustained between the years 1997 and 1998 came up to only RM163,065 and he said that Rahaz Sdn Bhd is a viable company with 22,500,000 Merbok Hilir Berhad shares in its stable and that he is the beneficial owner of the said shares. With these averments, Dato' Samsudin deposed that there were no merits in Fulcrum's application in encl. 44 and he then prayed that encl. 44 be dismissed with costs.

Lum Sing Fai responded by way of an affidavit in encl. 68. In that affidavit, Lum Sing Fai deposed to the issues of case management, discontinuance of Fulcrum's appeal to the Court of Appeal, interim injunction, hearing dates, adjournments and postponements – all of which were mere repetitions of what he had said earlier. Lum Sing Fai deposed that in view of the defendants' current financial position, it was unlikely that the defendants would be able to indemnify Fulcrum for losses suffered as a result of the interim injunction. Of significance would be the averments by Lum Sing Fai to the effect that:

(1) the shares in Merbok Hilir Berhad held by Fulcrum pursuant to the charge have an estimated market value of RM67,000,000,00;

(2) the estimated value of the said shares was insufficient to cover the present indebtedness of the defendants;

(3) one Tunku Jaafar Nong by letter dated 18 May 2000 made an offer to Fulcrum to purchase the entire block of the Merbok Hilir Berhad shares held by Fulcrum for the purchase price of RM67,275,000; and the tenor of the letter of offer was in the following terms (see exh. "LSF 3" of encl. 68):

> OFFER TO ACQUIRE 29.250.000 MERBOK HILIR BERHAD SHARES
>
> I understand that currently 29.25 million shares in Merbok Hilir Bhd ('the Merbok shares') are pledged to yourselves as security for a loan granted to one Rahaz Sdn Bhd, which loan is now in default.

I understand however that you are currently injuncted from dealing with the said shares. Nevertheless, I am please(d) to convey my utmost interest in acquiring the said Merbok shares ('Proposed Acquisition') subject to the terms and conditions as detailed in the enclosed Appendix 1.

Kindly inform me within fourteen (14) days upon the occurrence of such key event(s) that would allow you to negotiate any proposed sale of the Merbok shares, and in any event, not later than 6 (six) months from the date hereof, failing which I shall assume that you are not in a position to deal with the Merbok shares and/or not agreeable to my offer.

Thank you.

Yours faithfully,
Sgd. (Illegible).
Tunku Jaafar Nong

and the appendix 1 which incorporated the terms and conditions were worded thus:

I am pleased to extend my Offer to you based on the following terms and conditions:

(1) PRICE

Total Available for Sale	:	29.25 million shares in Merbok Hilir Bhd
Total Offered for Purchase	:	29.25 million shares in Merbok Hilir Bhd
Purchase Price Per Share	:	RM2.30
TOTAL CONSIDERATION	:	RM67.275.000

(2) CONDITIONS

(i) Fulcrum Capital Sdn Bhd ('FCSB')'s position to deal

The prohibitory injunction restraining FCSB from dealing with the Merbok shares to be lifted/set aside to enable FCSB to be in a position to deal with and or dispose of the Merbok shares.

(ii) Rights Attached to Shares

The Merbok shares are to be sold free from all claims, charges, liens encumbrances and equities with all rights and entitlement attached thereto.

(iii) Formal Agreement

The execution of the formal agreement(s) between the FCSB and ourselves and any other party(ies), if required, on mutually agreed terms.

In return for your agreeing to the above terms and conditions, I undertake to procure the consent of the other existing shareholders of Merbok to our Proposed Acquisition.

I would be grateful if you could reciprocate favourably and timely to my offer.

Lum Sing Fai verily believed that in the event the injunction was not set aside, Fulcrum would be unable to dispose off the Merbok Hilir Berhad shares to the prospective purchaser and he proceeded to stress that it was entirely uncertain whether Fulcrum would be able to attract similar proposals in the near future in order to satisfy the defendants' indebtedness. For these reasons, Lum Sing Fai prayed that encl. 44 be allowed by this court.

By way of an affidavit in encl. 69 that was affirmed by Lum Sing Fai on 16 June 2000 as a response to encl. 59, it was deposed that the dismissal of Fulcrum's application for summary judgment was in respect of an interlocutory application and, consequently this court, so it was deposed, had not made a final ruling on the merits as well as on the validity of the defendants' defence. Lum Sing Fai was advised and he verily believed that Fulcrum was entitled to maintain that Dato' Samsudin was in default of his obligations in spite of the order of James Foong J on 16 December 1998. Lum Sing Fai was further advised and he verily believed that there had been no breach of the order dated 12 December 1998 of James Foong J as alleged by Dato' Samsudin and it was the stand of Lum Sing Fai that Fulcrum had respected that order dutifully throughout these proceedings.

I have deliberately reproduced the contents of the affidavits in adjudicating encl. 44. It was a tedious course to undertake but it was taken as a measure to ensure fairness to all parties.

Reverting back to encl. 44 which was initially heard on 2 August 2000, Mr. M. Pathmanathan drew my attention to the alternative prayer thereto which sought Dato' Samsudin to provide fortification for his undertaking as to damages pursuant to the injunctive order dated 16 December 1998 amounting to the value of the shares pledged as at the date of the order to be made herein. According to Mr. M. Pathmanathan if I were to accede to the amended prayer (1) of encl. 44, then prayer (2) of encl. 44 would fall and he strongly emphasised and laid stress on the amended prayer (1) of encl. 44 in view of the firm offer by Tunku Jaafar Nong as alluded to earlier. It was the submission of Mr. M. Pathmanathan that it was not easy to find a buyer who was willing to pay such an amount.

Mr. M. Pathmanathan referred to the letter from Fulcrum to Rahaz Sdn Bhd dated 10 October 1997 (hereinafter referred to as the "not happily worded letter") which was exhibited in encl. 3 and marked as exh. "P 8" and it was partially reproduced in the early part of this judgment. The full text was worded as follows:

October 10, 1997

Rahaz Sdn. Bhd.
3rd Floor, Wisma Socfin
Jalan Semantan
Damansara Heights
50490 Kuala Lumpur
Attn: Dato' Samsudin Abu Hassan/Encik Mohd Azahari Abu Kassim

YB Dato'/Dear Sirs,

RE: TERM LOAN OF RM76,219,512-00 ('the Facility')
- Reference No. TL/165/09/96/12

We refer to the abovementioned and note your request to extend the tenure of the Facility for a further six months (6) months from October 9, 1997.

In reply, we are pleased to confirm that we are agreeable to your request for the loan extension subject to your fulfillment of the following terms and conditions PRIOR to loan extension:

(i) Payment of the outstanding interest (calculated at eighteen percentum (18.0%) per annum upfront from October 10, 1996 to October 9, 1997) amounting to Ringgit Malaysia Thirteen Million Seven Hundred Nineteen Thousand Five Hundred and Twelve (RM13,719,512); and

(ii) Payment of loan extension fee of Ringgit Malaysia Six Hundred Twenty Five Thousand (RM625,000) or equivalent to 1.0% flat on the principal amount of RM62,500,000.

Ensuing the above, the new maturity date of the Facility is April 9, 1998.

All other terms and conditions in our Letter of Offer dated September 27, 1996 and the Security Documents for the above facility shall remain unchanged and in force throughout the extended tenure.

Kindly indicate your acceptance of the loan extension conditions abovementioned by signing and returning to us the enclosed duplicate of this letter together with the payment of RM14,344,512 within seven (7) days from the date of this letter, failing which, this offer automatically lapses.

Thank you.

and Mr. M. Pathmanathan submitted that there was no mistake as to what was intended. He too submitted that there was no double charging at all. Mr. M. Pathmanathan surmised that Dato' Samsudin's case revolved on these points: that upon payment of RM6.5 million, Fulcrum have agreed to the roll over of the interest together with the principal for a period of 6 months expiring on 9 April 1998. Mr. M. Pathmanathan then submitted that if that was the case, it was incumbent on Dato' Samsudin's part to put his money where his mouth is and come 9 April 1998, Dato' Samsudin should effect the repayment of the loan facility. Mr. M. Pathmanathan further surmised that Dato' Samsudin was holding onto the notion that by virtue of the not happily worded letter, the whole loan facility was not repayable. Mr. M. Pathmanathan submitted further that 9 April 1998 has long gone and the interest now stood at RM32 million and yet Dato' Samsudin has remained silent. I have no opinions nor judgments to express and pass in regard to Mr. M. Pathmanathan's submissions in regard to the not happily worded letter. I leave the matter open and I adopt an open mind. This would be the best approach to adopt in the present circumstances.

Mr. M. Pathmanathan proceeded further to submit and he had this to say: "that an injunction is an equitable remedy and equitable principles must surely apply." He further submitted that: "he who seeks the aid of equity must come with clean hands." He submitted further that when the loan was not repaid on 9 April 1998, Fulcrum was then entitled to realise the securities by liquidating them. It was Mr. M. Pathmanathan's stand that the injunction that was issued by James Foong J on 16 December 1998 was the stumbling block that prevented Fulcrum from realising the securities – particularly the shares of the Merbok Hilir Berhad that were pledged by Rahaz Sdn Bhd and Dato' Samsudin to Fulcrum. Mr. M. Pathmanathan emphasised the defendants' current financial status which would prevent them from indemnifying Fulcrum for losses suffered as a result of the interim injunction and for this exercise he referred to the affidavit in encl. 68 at para. 12 thereof. Mr. M. Pathmanathan submitted further that it is now the second half of the year 2000 and Fulcrum is interested in selling those shares and it was for this reason that Fulcrum sought leave of this court as per the amended prayer (1) of encl. 44. It was the submission of Mr. M. Pathmanathan that the prospective purchaser in the person of Tunku Jaafar Nong is interested in purchasing those shares and there could not be any other buyer at this point of time. My attention was drawn to the affidavit in encl. 68 and according to Mr. M. Pathmanathan there was no rebuttal of encl. 68 and neither was there an application for time to rebut encl. 68 at all. This meant, according to Mr. M. Pathmanathan, that the allegation of the defendants' weak financial position remained unrebutted. According to Mr. M. Pathmanathan, the shares if sold to Tunku Jaafar Nong would fetch a handsome sum and at the same time a

modest sum of RM67.275 million as against the debts which the defendants would have to repay in the region of RM100 million together with the interests thereto. In submitting the way he did, Mr. M. Pathmanathan was trying to show to this court that the debt together with the interest has come up to RM100 million while the shares if sold to Tunku Jaafar Nong merely fetches a figure of RM67.275 million. It was the submission of Mr. M. Pathmanathan that Fulcrum's sworn affidavit in encl. 68 which annexed Appendix 1 showed the purchase price per share to be RM2.30 and it would be difficult to obtain a similar offer in the future. Since there was no rebuttal of encl. 68, Mr. M. Pathmanathan relied on the principles as laid down in the following cases:

(1) *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332, 333 ("Where a case is to be decided on a contest of affidavits, the rule is clear. Material allegations which are not contradicted are deemed to be admitted: see *Tynte v. Buller* [1854] 23 LJ Ch 504, 2 WR 309" – per Shankar J).

(2) *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339, 334 ("Consequently, the failure of the plaintiff in filing an affidavit in opposition would mean that the plaintiff admits to what was alleged in encl. 12 (*Overseas Insurance Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332). Way back in 1986, Lee Hun Hoe CJ (Borneo) (as he then was) said in *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382 SC:

> There is force in the appellant's contention that an affidavit must reply specifically to allegations, and if it does not, then those allegations not replied to must be taken to have been accepted.

In my judgment, affidavit play a crucial rule in originating summonses as submissions and decisions are primarily hinged on affidavit evidence" – per Malik Ishak J).

(3) *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 MLJ 281 CA, 286 ("Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332" – per Gopal Sri Ram JCA).

to the benefit of Fulcrum.

Mr. M. Pathmanathan drew my attention to the affidavit in reply of Soo Kim Wai, a director of Fulcrum, who affirmed that affidavit on 10 December 1998 as reflected in encl. 7. At para. 5.7 of encl. 7, Soo Kim Wai sought to explain the contents of the not happily worded letter in this way:

> In reply to para. 13, I state that the said sum of RM1,500,000.00 which was paid by the defendant was in settlement of the upfront interest portion of the loan i.e. in settlement of RM13,719,512.00 which forms part of the principal loan sum. It is in this context that the said sum has been referred to as repayment towards 'interest'.

At para. 5.12 of encl. 7, Soo Kim Wai deposed:

> In reply to paragraphs 16a and 16b, I state that the letter of demand from M/S Iza Ng Yeoh & Kit (exhibit 'MA-2') clearly states the amount disbursed to the defendant was RM62,500,000.00 as the balance loan sum of RM13,719,512.00 was due from the defendant to the plaintiff as upfront interest. The heading of the said letter shows the full term loan sum of RM76,219,512.00. I repeat and adopt my averments in paragraph 5.3 above. The sum of RM13,719,512.00 formed part of the principal loan sum when it was provided for the benefit of the defendant and the defendant utilized this sum to pay the upfront interest due to the plaintiff.

Soo Kim Wai then continued as para. 5.13 of encl. 7 in these words:

> Paragraph 16c is denied and I state that although the defendant had settled the upfront interest the defendant was obliged to settle the sum of RM13,719,512.00 of the principal sum which it had utilized to settle the upfront interest. This sum is what is referred to as 'interest' in the various correspondences between the parties. I repeat and adopt my averments in paragraph 5.7 above.

For the present exercise, I have nothing to say in regard to paras. 5.7, 5.12 and 5.13 of encl. 7. I merely reproduce these paragraphs to show that Mr. M. Pathmanathan had laid emphasis on them and according to him had explained the not happily worded letter.

It was next argued by Mr M. Pathmanathan that the defendants should be bound by their pleadings. He submitted that since the defendants had said that the loan was extended to 9 April 1998, the time was now opportune for Fulcrum to be repaid and to enable this to be done, Fulcrum must sell those pledged shares to realise its worth in monetary value and to do so Fulcrum now sought leave of this court. The injunctive order of James Foong J. dated 16 December 1998 was the barrier to prevent Fulcrum to sell the pledged shares. An injunction, be it prohibitive or restrictive, refrains the person so directed to refrain from doing an act. It prohibits or restrains an individual from doing certain things. In the context of encl. 44, the securities alluded to

in the early part of this judgment were restrained by an injunction. In the case of a mandatory injunction, the prohibitive injunction may be granted at the closure of the trial or it may even be granted at an interlocutory stage. It must be borne in mind that an ex parte interim injunction may be obtained which by its very nature is prohibitive in effect. The House of Lords in *American Cyanamid v. Ethicon* [1975] AC 396 laid down the general principles to be applied when applying for interim or interlocutory injunctions. There it stated that the following conditions must be satisfied before the court grants an interim or interlocutory injunction:

(a) that there is a serious question to be tried;

(b) that damages may not be an adequate remedy; and

(c) that on the balance of convenience, the balance tilts in favour of the applicant who seeks the injunction.

The seriousness and the gravity of the injunctive order of James Foong J prompted Fulcrum to obtain leave to sell the shares of Merbok Hilir Berhad that were pledged by Rahaz Sdn Bhd and Dato' Samsudin to Fulcrum. It was to avoid being cited for contempt that Fulcrum filed the amended prayer (1) of encl. 44.

It was the submission of Mr. M. Pathmanathan that Fulcrum had everything to gain by realising the sale of those shares. Indeed it was also his submission that the defendants in both the actions should stand to gain by the sale of those shares and for these reasons he sought for the amended prayer (1) of encl. 44 to be granted.

Mr. Manjit Singh, another learned counsel for Fulcrum, submitted and focused his attention on the alternative prayer (2) of encl. 44. For starters, he submitted that the injunctive order that was granted on 16 December 1998 emphasised an early trial dates which were set on 1 June 1999 and 2 June 1999 but were vacated because of the court vacation. This was followed by case management that was fixed on 9 April 1999. In the meantime, the Samsudin Action was consolidated with the Rahaz Action. Mr. Manjit Singh then proceeded to submit that I had fixed the hearing for both the actions on 17 April 2000 to 21 April 2000 but on request of Dato' Samsudin those dates were vacated because the counsel of his choice was engaged in the Malacca High Court. I too, according to him, had fixed both the actions for hearing on 20 November 2000 to 30 November 2000. Mr. Manjit Singh then drew my attention to para. 11 of encl. 43 and he submitted that the circumstances have changed since the early trial dates which was the basis for the granting of the injunction never materialized. He drew my attention to the SMG Holdings Limited shares

– the South African shares, that were pledged by Dato' Samsudin and he submitted that those shares were worthless because its trading had been suspended and until its suspension had been lifted those shares could not be sold. This was the material change in the circumstances, so the submission went, and it was for these very reasons that the continuance of the injunction was causing irreparable harm to Fulcrum. Mr. Manjit Singh increased the tone of his voice and he submitted forcefully when he said that the interest was escalating day by day and that the interest together with the principal loan had touched the RM100 million mark. Mr. Manjit Singh then submitted that in the event Fulcrum succeeded at the trial, the entire shares that were pledged by the defendants were inadequate to cover the defendants' indebtedness to Fulcrum. With this scenario in mind, Mr. Manjit Singh then submitted that despite being served with encl. 44, the defendants have not shown to this court the ability to pay the undertaking as to the damages on which the injunction was secured. The importance of an undertaking as to damages was emphasised by Lord Denning MR in the *Third Chandris Shipping Corporation and Others v. Unimarine SA, The Pythia, The Angelic Wings, The Genie* [1979] 2 All ER 972 CA where at p. 985 of the report, his Lordship said:

> The plaintiffs must, of course, give an undertaking in damages, in case they fail in their claim or the injunction turns out to be unjustified. In a suitable case this should be supported by a bond or security: and the injunction only granted on it being given, or undertaken to be given.

In *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No. 4)* [1998] 4 CLJ Supp 319, at pp. 376 to 377, I spoke briefly in regard to an undertaking as to damages and this was what I said:

> It is the practice of the courts to require the plaintiff to undertake to abide by any order the court may subsequently make for the payment of damages to the defendant for the loss suffered because of the grant of the injunction. Lord Diplock in the *American Cyanamid* case [1975] 1 All ER 504 must have envisaged the possibility of a 'wrong' decision being made at the interlocutory stage to be real and not imaginary, and at p. 509a his Lordship had this to say:
>
> > … when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made on contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time ex hypothesis the existence of the right or violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.
>
> It is obvious that the purpose of the undertaking is to simply vest to the court with the necessary jurisdiction to make the appropriate orders to recompensate the loss suffered by the defendant when it is subsequently established that the

plaintiff was not entitled to the injunction in the first place. Unless and until such an undertaking is given, the defendant wrongly enjoined will hardly have any recourse against the plaintiff (*Attorney-General v. Albany Hotel Co* [1896] 2 Ch 696 at p. 699). An undertaking as to damages is always required before the court grants an interlocutory injunction. Consequently, it is a correct statement of the law to say, on the authority of the *American Cyanamid* case [1975] 1 All ER 504 at p. 510, that the ability of the plaintiff to honour his undertaking is a pivotal or a material factor in the balance of convenience. But money is not everything. The courts will not deny the poor plaintiff an interlocutory injunction simply because of his limited financial resources (*Allen v. Jambo Holdings Ltd* [1980] 2 All ER 502). Poverty do not bar the right to an injunction if the circumstances warrant it. In the event there may be difficulty in enforcing the plaintiff's undertaking, either because the plaintiff might not be worth 'powder and shot' then the plaintiff is obliged to fulfil his undertaking (*The Mito* [1987] 2 Lloyd's Rep 197 at p. 198). And if the plaintiff is outside the jurisdiction, the court may require him to give an undertaking by way of a security (*Baxter v. Claydon* [1952] WN 376). The best form of security would be by way of a bank guarantee (*Castle Fitness v. Manz* [1990] 1 MLJ 141). The court too may even be magnanimous and allow an undertaking to be given by a person who is not a party to the action but who is within jurisdiction (*Ferragamo v. Lotus & Delta Ltd* [1950] 67 RPC 175). In practice the court will not embark on an elaborate investigation as to the financial means of a particular plaintiff. A bare undertaking, like the present case, is sufficient. Here, the plaintiffs went beyond the call of duty when they disclosed that the 2nd plaintiff was worth RM80 million. It was on the defendants' part, if they doubted this kind of undertaking, to garner evidence to show the financial status of the 2nd plaintiff by way of affidavit evidence. Nothing of that sort was forthcoming from the defendants.

In the context of encl. 44 of prayer (2), Mr. Manjit Singh submitted as to the financial impediments of the defendants. It was his submission that in 1998 Rahaz Sdn Bhd accumulated losses at RM17,373,682 as reflected in encl. 52 of exhibit "LSF 2". He even cautioned the court when he submitted that "we don't know the figure for 1999." It was Mr. Manjit Singh's submission that since the defendants gave the undertaking as to damages, the defendants must show that it was worth powder and shot and not just a mere piece of prayer. An empty undertaking was not worth powder and shot. Was the undertaking in the present case an empty one devoid of monetary value? Mr. Manjit Singh submitted, from the tenor of his submission, that the defendants gave an empty undertaking without any monetary value. It was also his submission that the defendants must satisfy this court in regard to their undertaking as to damages.

Must a poor applicant be deprived of his right to obtain an interim injunction? To put in another way, will an applicant of limited financial means be deprived of his right to secure an interim injunction? The answer would be in the negative. I have said in *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No. 4) (supra)* that: "Poverty do not bar the right to

an injunction if the circumstances warrant it." Indeed as Lord Denning MR remarked in *Allen And Others v. Jambo Holdings Ltd & Ors* [1980] 1 WLR 1252, especially at p. 1256 to p. 1257:

> There is one other point that I must mention. It is said that whenever a Mareva injunction is granted the plaintiff has to give the cross-undertaking in damages. Suppose the widow should lose this case altogether. She is legally aided. Her undertaking is worth nothing. I would not assent to that argument. As Shaw L.J. said in the course of the argument, a legally aided plaintiff is by our statutes not to be in any worse position by reason of being legally aided than any other plaintiff would be. I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it. One has to look at these matters broadly.

Clough J of the Hong Kong High Court in *Union (V-Tex) Shirt Factory Ltd (In Liquidation) v. Union V-Tex Realty Ltd & Ors* [1985] 2 HKC 617, 630 also remarked:

> As regards prejudice to Realty, its counsel rightly stressed that there was the clearest evidence that the plaintiff was not good, or anything like good for its undertaking as to damages if an injunction were granted. This is clearly an important factor to consider in relation to the balance of convenience. However, in the light of *Allen v. Jambo Ltd* [1980] 1 WLR 1252 (CA), the impecuniosity of the plaintiff should not by itself be a ground for denying interlocutory relief to the plaintiff if such relief is justified on a broad view of the balance of convenience and the essential justice of the case between the parties.

Shaik Daud JCA writing a separate judgment for the Court of Appeal in *Kho Ah Soon v. Ooi Kar Seng (Properties) Sdn Bhd* [1995] 3 CLJ 812, 818 remarked in the same vein:

> Even plaintiffs who are poor should not be denied caveats and injunctions. Questions of financial ability should not affect the position of the essential justice of a case as between the parties. (See *Allen v. Jumbo Holdings Ltd & Ors.* [1980] 2 All ER 502). In that case it was held that the issue of mareva injunction ought not to be determined solely by a plaintiff's financial standing and in each case the issue of an injunction depended on the balance of justice and convenience.

All said and done, the ability of the applicant to honour his undertaking is a crucial factor in the balance of convenience for the court to consider (see the *American Cyanamid*'s case *(supra)* particularly at p. 510 thereof).

Mr. Manjit Singh drew my attention to the decision of Mr. Justice Hirst in *Commodity Ocean Transport Corporation v. Basford Unicorn Industries Ltd (The Mito)* [1987] 2 Lloyd's Law Reports 197 especially to the speech of his Lordship that appeared at p. 198 of the report. There his Lordship observed:

May I make it plain at the start that there is no doubt in my judgment that the Court has power at the time of either granting or extending a Mareva injunction to order security in support of the usual cross-undertaking, in other words to fortify the injunction by security in the manner which was ordered, for example, by Mr. Justice Roxburgh in the case of *Baxter v. Claydon*, [1952] W.N. 376. In other words if the Court considers that the cross-undertaker, usually the plaintiff, might not be worth powder and shot if it be held that he is obliged to fulfil his cross-undertaking, the Court can strengthen the undertaking by requiring some sort of security.

and using these passages as a leverage, Mr. Manjit Singh stressed the need to "strengthen the undertaking by requiring some sort of security" on the part of Dato' Samsudin. Mr. Manjit Singh then proceeded to refer to the case of *Marc Rich & Co Pte Ltd v. Oroleum International Ltd* [1987] May issue of MLJ at p. clxxviii where the editorial write up was worded in this fashion:

In *Marc Rich & Co. Pte. v. Oroleum International Ltd.* (Singapore Suit No. 4837 of 1986) the plaintiffs had obtained *ex parte* a Mareva injunction on September 4, 1986 against the defendants' assets, *ie*, 115,000 barrels of naphtha stored at Esso Refinery in Singapore. The injunction was granted on the usual undertaking of the plaintiffs as to damages which might be suffered by the defendants and innocent third parties. The injunction was discharged on September 17, 1986 upon the defendants' provision of a banker's guarantee. Subsequently, the defendants applied (S/C No. 9822 of 1986) to the court for an order that the plaintiffs fortify their undertaking for damages with a banker's guarantee.

The issue for decision was whether the defendants would be entitled to security in respect of the plaintiffs' undertaking after discharge of injunction.

The defendants contended that there was authority (see Lord Denning in *The Third Chandris* [1979] 2 All E.R. 980 at p. 985) to the effect that the plaintiffs' undertaking would be supported by a bond or security and the injunction could only be granted on it being given. However, in appropriate cases, the court had the jurisdiction to order that the plaintiffs' undertaking be fortified by a security even though the injunction was discharged.

The plaintiffs in reply contended that the undertaking they gave was an undertaking which did not include an undertaking to fortify. Once the injunction was discharged, the court had no jurisdiction to order the undertaking to be fortified. It would not be possible in law to require the plaintiffs to fortify their undertaking.

The following cases were cited: (1) *Tucker v. New Brunswick Trading Company of London* [1890] 44 Ch.D. 249, 252; (2) *Baxter v. Clayton* [1952] W.N. 376 and (3) *Harman Pictures, N.V. v. Osborne & Ors*. [1967] 2 All E.R. 325, 337.

Lai Kew Chai J in allowing the application (October 30, 1986) said:

> As for the fortification of Plaintiffs' undertaking, I am of the view that once a party gives such an undertaking to the Court it should be taken to have said to the Court that it is not only willing but able at the time the undertaking was given to pay such damages as the Court may order. Since the undertaking is still subsisting, I am of the view that I have jurisdiction to order its fortification. I so order on the basis that had I known all that has been alleged against the Plaintiffs, I would have imposed fortification as a condition for the grant of the interim injunction. As for the amount, I reduce it to US$82,000 which Plaintiffs must fortify within 14 days by a bank guarantee in terms acceptable to the Defendants' solicitors with liberty to apply'.

According to the *Concise Oxford Dictionary*, 9th edn, the word "fortification" means "the act or an instance of fortifying; the process of being fortified; the art or science of fortifying; defensive works fortifying a position; an act of strengthening." *The Britannica World Language, Edition Of The Shorter Oxford English Dictionary*, defines the word "fortification" as "the action of fortifying". The same dictionary too defines the word "fortify" as "to render more powerful or effective." Steven Gee and Geraldine Mary Andrews wrote a book entitled *"Mareva Injunctions: Law and Practice"* and at p. 60 thereof the learned authors had this to say in regard to fortification of an undertaking:

> One matter which it is material for the court to take into account in deciding whether a Mareva injunction should be granted, is whether the plaintiff's undertaking in damages is actually worth anything or not (*Ashtiani v. Kashi* [1986] 3 WLR 647 per Dillon LJ at p 659). It is incumbent upon a plaintiff and his legal advisers to tell the court if there are circumstances which make it possible or likely that the undertaking is or will become worthless – eg if the plaintiff is insolvent or bankruptcy or winding-up proceedings have been issued against him. Is such information is withheld, albeit without *mala fides*, the plaintiff's solicitors may be made personally liable in damages and costs to the defendant – see eg *Schmitten v. Faulkes* [1883] WN 64.
>
> It is entirely a matter for the court's discretion whether it will require the plaintiff to put up security to back his undertaking in damages (usually in the form of a bank guarantee, or payment of a specified sum into a joint account in the names of the parties' solicitors). It is more usual for the court to decide whether security should be provided at the inter partes hearing, because that is normally the time at which the court is in the best position to assess the merits and make an estimate of the nature and extent of the damage which the defendant may suffer if it later appears that the injunction should not have been granted, so that security can be ordered for a realistic amount. However, the court may require security to be provided even at the ex parte stage, if the circumstances so warrant, and may make the provision of such security a condition precedent to the granting of the injunction.

> Although no general rule can be stated as to when the court would order fortification of the cross-undertaking, it is likely that some security would be ordered in circumstances where the defendant could make a successful application for security for costs: the plaintiff's financial position, his domicile or place of business and the strength of his case are among the relevant factors normally considered by the court.

The cases of *Whitworth v. Rhodes* [1850] 20 LJ Ch 105; *Shaw v. Earl of Jersey* [1879] 4 CPD 359 CA; *Cavenagh v. Cohen* [1919] 147 LT Jo 252; *Jones v. Pacaya Rubber and Produce Co., Ltd* [1911] 1 KB 455; and *Lister v. Cowdery* [1900] 21 LR (NSW) Eq 4 lay down a singular principle of law that is worth repeating. It is this. That in appropriate cases, the applicant may be required to, not only, give an undertaking as to damages but also to lodge a security, or to give an undertaking that he will do so, in order that the satisfaction of any order as to damages or otherwise may be sufficiently guaranteed. In my judgment, it follows, as the night the day, that where there is evidence of the inadequacy of the applicant's financial resources and there is a substantial doubt as to whether the opposite party will be adequately protected by an undertaking given by the applicant, then the court is empowered to order that either security be provided for the undertaking or for that matter a third party to provide for that undertaking, with security if appropriate befitting the circumstance of the case. (See the *Third Chandris Shipping Corporation and Others v. Unimarine SA, The Pythia, The Angelic Wings, The Genie (supra)*). By way of an analogy, reference should be made to the case of *Walsh v. Lonsdale* [1882] 21 Ch D 9 where the court there was confronted with an application for specific performance of a contract to enter into a lease and where it appeared that the plaintiff had not paid the rent owing under the contract, and on these facts the court allowed the interim injunction on the basis that the plaintiff should pay the amount of rental into court. Similarly in *Macleod v. Jones* [1883] 24 Ch D 289; and *Inglis v. Commonwealth Trading Bank of Australia* [1972] 126 CLR 161 the mortgagors who had not paid the amounts claimed to be owing under the mortgage and who wished to restrain the mortgagees from selling the properties before the final hearing of the actions, were ordered to deposit those amounts into courts.

Mr. Manjit Singh was at pains to point out that the fortification which Dato' Samsudin should provide for his undertaking as to damages should be in the region of RM100 million since the principal loan together with the interest have touched that amount. He cited the case of *Third Chandris Shipping Corporation and Others v. Unimarine SA, The Pythia, The Angelic Wings, The Genie (supra)* and urged this court to exercise its discretion in ordering fortification for the undertaking which Dato' Samsudin tied himself to. He rounded up his submission by seeking this court's indulgence to grant the

alternative prayer (2) of encl. 44 against Dato' Samsudin to be secured by way of a bank guarantee in the sum of RM100 million in favour of Fulcrum or in solid cash in favour of Fulcrum.

Dato' V. Sivaparamjothi for Fulcrum had nothing to say in regard to encl. 44.

Madam DR John for the defendants applied for an adjournment as she needed time to respond to the submissions of both Mr. M. Pathmanathan and Mr. Manjit Singh. She said that she needed an adjournment until 8 August 2000. This court granted her request for an adjournment.

Enclosure 44 (The Hearing On 8 August 2000)

At the start of the hearing, Mr. M. Pathmanathan made an oral application to amend the second prayer to encl. 44. He craved the leave of this court to:

(1) delete the word "alternatively," and

(2) substitute the word "value" for "shortfall", and

(3) delete the words "shares pledged as at the date of the order to be made herein" and substitute it with the words "outstanding amount of RM37.25 million as at 31 July 2000 and payable within 14 days from the date of this order."

He too craved for the same amendments to be made to the Malay version of the second prayer to encl. 44. The ultimate amendments to prayer (2) of encl. 44 were worded in this way:

> that Dato' Samsudin Abu Hassan do provide fortification for his undertaking as to damages pursuant to the Order dated 16.12.1998 amounting to the shortfall of the outstanding amount of RM37.25 million as at 31.7.2000 and payable within 14 days from the date of this order.

Madam DR John for the defendants submitted that the amendments were substantial in nature and they were made on an oral basis. Those amendments, according to her, completely changed the prayers in encl. 44 bearing in mind that Mr. M. Pathmanathan had submitted on 2 August 2000 extensively on the amended prayer (1) of encl. 44 with prayer (2) couched in the alternative. It was her submission that Fulcrum should amend in the normal manner preferably by way of a formal application. It was also her submission that an oral application of this nature will prejudice the defendants as it would deprive the latter from preparing a proper rebuttal of the submissions made on behalf of Fulcrum on 2 August 2000. It was further submitted that the oral amendments to prayer (2) of encl. 44 totally abandoned the alternative prayer and in its place sought for Dato' Samsudin to provide security for a sum which

was the balance of the so called value of the shares. It was also her submission that an amendment of this nature which was based on calculation done orally by Fulcrum had to be investigated further and that such an application should be made formally in a written form. It was her submission that the oral amendments to prayer (2) of encl. 44 changed completely the character of encl. 44 in its original text. For these reasons, she prayed that the oral amendments to prayer (2) of encl. 44 be disallowed.

Mr. M. Pathmanathan took up the cudgel and strenuously argued that the oral application to amend prayer (2) of encl. 44 did not materially alter the character or the nature of the prayer. It was his stand that the proposed amendments merely modified the second prayer in encl. 44. He submitted that the second prayer in its original form was for Dato' Samsudin to provide for the full fortification of the full value of the shares that were pledged. He pointed out that the oral amendment sought fortification for a much smaller amount: confining itself to the shortfall from the sale of the Merbok Hilir Bhd shares to Tunku Jaafar Nong with that of the outstanding loan. Mr. M. Pathmanathan emphasised that the parties were present to address the court on the prayers in encl. 44. It was his submission that the facts and the law relating to the amended prayer (1) and the proposed amendment to prayer (2) of encl. 44 have to be addressed and so the question of surprise or new issue cropping up did not arise at all. He submitted that by virtue of prayer (3) of encl. 44, Fulcrum was entitled to seek relief from the court for the proposed amendment to prayer (2) of encl. 44. It must be recalled that prayer (3) of encl. 44 contains an enabling prayer couched in positive terms where it sought for "further or other orders or directions be made or given as this Honourable Court deems fit." Indeed Salleh Abas FJ, delivering the judgment of the Federal Court, in the case of *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] 2 MLJ 156 aptly said at p. 160 of the report:

> In any case prayer (e) in paragraph (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for 'loss of earning' in paragraph 5 (a) should entitle the court to make such an assessment.

and, accordingly, I must therefore give effect to prayer (3) of encl. 44. Mr. M. Pathmanathan submitted that both he and Mr. Manjit Singh had addressed this court on the amended prayer (1) and the unamended prayer (2) of encl. 44 while Madam DR John had yet to begin. That being the case, so the submission went, there was no prejudice occasioned and it was emphasised that the submission that a formal application should be made in regard to the proposed amendments to prayer (2) of encl. 44 merely fortified Fulcrum's allegation of delay that was perpetrated by the defendants. In the premises, Mr. M. Pathmanathan urged this court to allow the oral amendment and to proceed with the matter forthwith.

Dato' V. Sivaparamjothi supported Mr. M. Pathmanathan and he too urged this court to allow the oral application to amend prayer (2) of encl. 44 forthwith.

Madam DR John took exceptions to the submissions of Mr. M. Pathmanathan and she submitted:

(1) it was unfair on the part of Fulcrum to rely on the delay that was perpetrated by the defendants in the course of advancing an argument to support the oral application to amend prayer (2) of encl. 44;

(2) that Fulcrum was not relying on prayer (3) of encl. 44 in order to amend prayer (2) of the same enclosure; and that being the case it was inappropriate for Fulcrum to fall back and seek refuge under prayer (3) of encl. 44;

(3) that the proposed amendment of prayer (2) of encl. 44 was burdensome;

(4) that the proposed amendment to prayer (2) of encl. 44 would benefit Fulcrum in that the latter would now have two prayers to rely upon; in comparison, the original prayer (2) of encl. 44 was couched in the alternative giving Fulcrum the option of relying on the amended prayer (1) of encl. 44; in the premises the proposed amendment to prayer (2) of encl. 44 was prejudicial to the defendants;

(5) that the defendants were not accorded ample opportunity to prepare and rebut the proposed oral amendment to prayer (2) of encl. 44.

and for these reasons, she prayed that, in the interest of justice, the oral application to amend prayer (2) of encl. 44 be disallowed.

In rebuttal, Mr. M. Pathmanathan submitted that, at the end of the day, any party was entitled to seek any prayer it sought for. Whether that party would succeed would be dependent on the merits of the application. Nobody, so the submission went, could stop a party from seeking any particular relief. Mr. M. Pathmanathan submitted that he was mystified as to what are the objections to an amendment to a prayer that could be allowed. It was submitted that the defendants should not step into the court's shoes and prejudge the issues by selecting which particular prayers that stood a better chance of success. Finally, Mr. M. Pathmanathan submitted that the proposed amendments to prayer (2) of encl. 44 would not, in any way, amend the prevailing issues that existed and he then craved for the court's indulgence to allow the proposed amendments orally.

Madam DR John conceded that I am the sole arbiter who could decide the issue. She then left the matter entirely to me to decide whether to allow the oral amendments or otherwise. She was even magnanimous by acceding to the proposed amendments to prayer (2) of encl. 44. I, for my part, out of judicial necessity, have painstakingly perused through the well refined submissions of the parties and, unhesitantly, I allowed the oral amendments to prayer (2) of encl. 44 for the following reasons:

(a) the oral amendments did not materially alter the character or the nature of the original prayer;

(b) it was more of a modification and it sought specifically for a much smaller amount by quantifying the figure, which figure was the shortfall of the Merbok Hilir Bhd shares sold to Tunku Jaafar Nong with that of the outstanding loan;

(c) there was no prejudice occasioned nor suffered by the defendants as the proposed amendments to prayer (2) of encl. 44 arose out of the same set of facts;

(d) there was no injustice as the defendants' counsel have yet to begin her submission in regard to encl. 44; and, lastly,

(e) the magnanimous gesture on the part of the defendants' counsel to the proposed amendments to prayer (2) of encl. 44.

Amendments that synchronise or blend with the facts of the case, like the present, are generally allowed in order to do justice to the case. Amendments ought to be made, according to Jenkins LJ in *GL Baker, Ltd v. Medway Building & Supplies, Ltd* [1958] 1 WLR 1216 at p. 1231, "for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings." Bowen LJ in *Cropper v. Smith* [1884] 26 Ch D 710-711 emphatically said:

> It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right.

and certainly it was "a matter of right" on the part of Fulcrum to make the oral application to amend prayer (2) of encl. 44. This was my judgment and I so hold accordingly.

Before proceeding to submit on the merits of encl. 44 especially in regard to the amended prayers (1) and (2) of encl. 44, Madam DR John handed to this court a written submission dated 8 August 2000 on encl. 44 and that written

submission has since been kept in the court file and available for viewing. But due to the constraint of time, the matter was adjourned to another date – to be precise, it was adjourned to the next day.

Enclosure 44 (The Hearing On 9 August 2000)

Madam DR John relied heavily on her written submission dated 8 August 2000. She emphasised on the issue of delay and it was her submission that Fulcrum had been dragging its feet on this matter. She too laid emphasis on the unreported decision of James Foong J dated 16 December 1998 as exhibited in encl. 43 which was marked as "LSF-1". She read extensively the unreported decision of James Foong J particularly at pp. 7 to 13 thereto. It was her submission that Fulcrum now sought leave to sell the shares of Merbok Hilir Berhad pledged by Rahaz Sdn Bhd and Dato' Samsudin, and in the process thereto Fulcrum was seeking to review the decision of James Foong J dated 16 December 1998. She submitted that the alleged loss suffered by Fulcrum in not being able to deal with the shares was bereft of evidence. She too emphasised the inability of Fulcrum to manage its own affairs since Fulcrum came within the scope of s. 176 of the Companies Act 1965. In her written submission dated 8 August 2000, Madam DR John stated that Fulcrum was undergoing a restructuring exercise under s. 176 of the Companies Act 1965 and was therefore protected from its creditors and in the event the shares were sold there would not be a way for the defendants to recover the losses suffered by them. She emphasised that the defendants have counterclaimed against Fulcrum. Now, in statutory form s. 176 of the Companies Act 1965 enables creditors voting at creditors' meetings to agree to a scheme of arrangement which, if approved by the court, will bind dissenting creditors. But the court will certainly refuse to call the creditors' meetings if the court holds the view that the scheme will not be approved: *Re Savoy Hotel Ltd* [1981] Ch 351; and *Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd (No 2)* [1993] 2 MLJ 353. It is indeed interesting to note that the court in *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 2 MLJ 31 set aside an *ex parte* order calling for creditors' and members' meetings on the ground that the interests of the unsecured creditors were not adequately safeguarded and confounded by the fact that it was against the concept of public policy to sanction a scheme of arrangement where the company was virtually insolvent. In approving the scheme, the court must always take into account the following considerations:

(1) whether a particular statute has been complied with (*Re Dorman Long & Co Ltd* [1934] Ch 635);

(2) that the majority representing a fair and proportionate proportion of the class had acted bona fide and were not promoting an interest which can be considered adverse to the class (*Re Alabama, New Orleans, Texas & Pacific Junction Railway Co* [1891] 1 Ch 213, 243);

(3) any reasonable man acting honestly, fairly and intelligently could reasonably have approved the proposed scheme (*Re NFU Development Trust Ltd* [1973] 1 All ER 135).

So much for a brief insight into the rigours of s. 176 of the Companies Act, 1965. Reverting back to the submission of Madam DR John, she then proceeded to set out the purpose of borrowing the monies from Fulcrum of which I need not dwell upon as it was alluded to in the early part of this judgment. Suffice for me to say that Madam DR John scrutinized every portion of her written submission and read them out to this court. It was a laborious process.

Mr. M. Pathmanathan was quick on the uptake and he went straight to the heart of the matter. He submitted that under the amended prayer (1) of encl. 44 the proceeds of the sale of those shares together with the fortification of the undertaking as to damages by Dato' Samsudin as alluded to in the amended prayer (2) of encl. 44 ought to be kept in an interest bearing account pending the trial of the action and that according to him would be governed by prayer (3) of encl. 44. Mr. M. Pathmanathan was also magnanimous when he suggested that those sums ought to be kept in a joint interest bearing account of both the parties' solicitors.

Mr. Manjit Singh was also precise and to the point. He submitted that Fulcrum was not setting aside the judgment of James Foong J. He submitted that there was a material change in circumstances – in the form of a ready buyer with a good price and that would mitigate the amount due to Fulcrum from the defendants. He submitted that it was not in the interest of the defendants to resist encl. 44 since the defendants did not challenge the price offered by Tunku Jaafar Nong. He then stressed the need to sell the shares "now rather than wait when the shares become worthless.

Mr. M. Pathmanathan echoed the same sentiments. He submitted that it was in the interest of both Fulcrum and the defendants to secure the best price for those shares. It was in his own words a "mutually beneficial" exercise.

Mr. Manjit Singh then took up the cudgel and he submitted rather bluntly, in the context of the not happily worded letter, that surely the defendants were not proceeding on the basis that just because of the defective notice, then the whole loan facility that was extended and disbursed by Fulcrum to the

defendants would be cancelled. Mr. Manjit Singh then referred to the Rahaz Action and he said that there the notice was good in law. Mr. M. Pathmanathan supported Mr. Manjit Singh and echoing the same sentiments he submitted that it was wrong to say that since the notice in the Samsudin Action was defective then the whole loan facility was extinguished.

The concerns of both Mr. Manjit Singh and Mr. M. Pathmanathan were well founded. Madam DR John in her written submission dated 8 August 2000 at p. 20 of para. 38 wrote the following words:

> The plaintiff (referring to Fulcrum) has submitted that the defendant (referring to Dato' Samsudin) and Rahaz are liable in any event upon expiry of the extension period, *ie*, by 9.4.1998. That submission is baseless as the plaintiff had already cancelled the term loan facility by its solicitor's letter dated 31.12.97.
>
> The plaintiff by denying the existence of the agreement to roll over and the subsequent cancellation of the term loan facility clearly relieved the second defendant Rahaz from performing on the agreement.

and this prompted Mr. M. Pathmanathan to seek for clarifications whether the term loan facility was still subsisting and whether the defendants were bound to pay the loan and whether the loan had not been extinguished as yet. Madam DR John responded and she said that the loan amount was still due and that the loan had not been extinguished. She reiterated that the loan was still subsisting and that the defendants have to pay the loan and that the loan had not been extinguished as yet. She then retorted and posed two questions:

(1) what was the amount due?

(2) what was the damages due to the defendants by way of the termination of the term loan facility?

She then applied for an adjournment in order to refer the matter to the defendants. She said that she needed more time and that Dato' Samsudin is presently in South Africa. She too stated that the matter may be settled. Thus, it was with a view for a possible settlement that the hearing of encl. 44 was postponed to another date and that date was scheduled on 21 August 2000.

Enclosure 44 (The Hearing On 21 August 2000)

Madam DR John informed the court that the matter could not be settled and she then proceeded to submit on encl. 44 by relying on her written submission dated 8 August 2000. She submitted on the following points:

(1) that Fulcrum was trying to short circuit the process of the law and was attempting to obtain judgment from the defendants without trial;

(2) that Fulcrum's calculation of its losses at RM104 million was a mere statement from the bar and those losses did not take into account the defendants' losses;

(3) the prayers which Fulcrum sought for can only be obtained at the trial proper;

(4) Fulcrum's submission that the defendants came to court with unclean hands were unsupported by affidavit evidence and the submission was merely done to prejudice this court;

(5) the conclusive evidence clause in the facility agreement was raised purely for the purpose of re-litigating the matter;

(6) that although the offer to purchase the shares by Tunku Jaafar Nong was not disputed by the defendants yet the latter held onto the notions that the shares were not for sale until the whole trial completed and in the interim period counter offers need not be made;

(7) the allegations about the defendants' debts were all speculative in nature;

(8) that Fulcrum is under re-structuring while Rahaz Sdn Bhd is in a healthy condition;

(9) the cases on fortification of an undertaking as to damages advanced by Fulcrum could readily be distinguished in that those cases were on mareva injunctions where the injunctions have been discharged; whereas, in the present case, the injunction was still subsisting and not discharged as yet, and, consequently, there was no reason for Dato' Samsudin to fortify his undertaking ;

(10) reliance was placed on the following cases:

(a) *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 MLJ 193; and

(b) *Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors (No: 4) (supra)*;

(11) that Rahaz Sdn Bhd held 22,500,000 of the Merbok Hilir Berhad shares and Rahaz Sdn Bhd too had RM35 million worth of assets as alluded to in para. 19 of encl. 59; and

(12) fortification would be oppressive and in the form of a penalty against Dato' Samsudin.

and it was for these reasons that she sought for the dismissal of the amended prayers (1) and (2) of encl. 44 and for the trial to proceed as scheduled.

Mr. M. Pathmanathan, by way of a rebuttal, submitted that the proceeds of the sale of the Merbok Hilir Berhad shares would be kept in an interest bearing account of the solicitors for both parties pending the outcome of the trial of these two consolidated actions. He submitted that the shares that were pledged by Rahaz Sdn Bhd came up to RM22.5 million while the balance of RM6.75 million was pledged by Mohd Salleh Yeob Abdul Rahman – the nominee of Dato' Samsudin. My attention was drawn to a textbook entitled *"The Principles of Equitable Remedies"* by ICF Spry, 4th edn, 1990 version where at p. 475 the learned author had this to say:

> If, in view of inadequacy of the plaintiff's financial resources, there is a substantial doubt whether the defendant will be adequately protected by an undertaking by him, the court ordinarily requires either that security be provided for the undertaking or that an undertaking be given by some other person, with security if appropriate.

Continuing on the next page which spills over to p. 477, the learned author said:

> Indeed, it appears that wherever there is a substantial doubt as to the ability of the plaintiff to discharge liabilities either under an undertaking or under the provisions of a relevant agreement or otherwise he may, if it appears to be desirable to do so, be required to lodge security as a condition of the grant of relief, either because on the balance of justice at that time any other order in his favour would unfairly prejudice the defendant or else because the court regards it as in any case appropriate that it should be enabled in this way to do justice subsequently by recompensating the defendant should the case so require (*Harman Pictures N.V. v. Osborne* [1967] 1 WLR 723; *Sanxter v. Foster* [1841] Cr. & Ph. 302, 41 ER 506).

Now, in applying the passages of the learned author to the facts of the present case, one needs only to substitute the word "plaintiff " with that of "Fulcrum" and the word "defendant" with that of "Dato' Samsudin" in order to understand the intent and purport of those passages. The learned author of the same textbook continued further to say at p. 477 the following salient words:

> Indeed, the power of the court, whether in its exclusive or auxiliary jurisdiction, to require an undertaking of any kind from the plaintiff or to impose any condition before granting an interlocutory injunction is very wide, and it is not limited to particular classes of undertakings or conditions. As has been seen already here, it may be exercised, not only wherever the balance of justice at that time would otherwise be found to incline against the grant of relief, but also if the giving of an undertaking or the imposing of a condition of the kind

in question is desirable in order to enable the court more easily to achieve justice between the parties in the subsequent course of proceedings.

Mr. M. Pathmanathan then continued to submit and he said that based on the defendants' own pleading there was an agreement for an extension of six months. He submitted that the defendants say that the loan was due on 9 October 1997 and by virtue of the extension, the loan would end on 9 April 1998. If that was the case, so the submission went, then there was no need to make any demand and that Fulcrum would be entitled on the defendants' non payment to realise the security by selling those shares. Flowing from this, the reasonable conclusion, so the submission went, would be that Dato' Samsudin and Rahaz Sdn Bhd were not in a financial position to repay those loans. According to Mr. M. Pathmanathan the effect of a fresh information was not limited to mareva injunctions but it also extended to all kinds of injunctions and, consequently, he said the court has the unfettered power to vary and discharge the injunction. As an authority for his proposition, he cited the textbook entitled *"Mareva Injunctions: Law and Practice"* by Steven Gee and Geraldine Mary Andrews where the learned authors at p. 56 said:

> It sometimes occurs that after the injunction has been granted *ex parte*, the plaintiff receives new information which affects the strength of his initial application. The plaintiff's duty to the court (and the professional duties of his legal advisers) will depend upon the nature of the fresh information. If that information shows that certain evidence placed before the court by the plaintiff was false or misleading, the plaintiff and his legal advisers must inform the defendant and the court as soon as possible, even if no application has been made to discharge the injunction, and even if knowledge of the true picture would probably result in the injunction being discharged. However, the plaintiff is probably under no duty to inform the defendant if the plaintiff discovers some evidence which, for example, reflects favourably on the *bona fides* of the defendant, or is otherwise favourable to the defendant, if that evidence does not render anything which was suggested to the court on the *ex parte* application untrue or misleading. If a plaintiff has obtained ex parte a Mareva injunction on a basis which the plaintiff knows that he can no longer support, he should apply to the court either to discharge the injunction, or to continue the injunction on a new basis.
>
> Thus it may be that certain material has been placed before the court which the plaintiff discovers to be misleading, but there is other material in the affidavit evidence from which he feels he can still draw a sufficiently adverse conclusion to enable him to maintain the injunction. In those circumstances, the correct approach is to tell the court and the defendant why the material in question has been discovered to be misleading, and to disclaim any further reliance on it, leaving the court to consider the merits of the continuation of the injunction on the material remaining before it. A variant of this situation

> is where the fresh information obtained by the plaintiff is given to his legal advisers in circumstances which would attract a claim for privilege, or, (perhaps less frequently) where a third party claims the fresh information is confidential and prohibits its disclosure or use in the litigation, so the plaintiff may not wish to state what it is unless the court orders him to do so. It is impossible to lay down any specific rules which the practitioner should observe in those circumstances, as the proper course of action will depend upon the facts in each case. However, one possible approach would be for the plaintiff to swear an affidavit, identifying the material in question and stating that since the *ex parte* hearing he has obtained further information, under circumstances attracting a claim for privilege or confidentiality, which shows the material to be false or misleading and consequently he disclaims all further reliance upon it. The plaintiff then applies to the court to reconsider the injunction.

and in the context of the present case, Mr. M. Pathmanathan submitted that the fresh evidence as seen in encl. 68 clearly showed that there was a change in the defendants' current financial condition in that the defendants were unable to indemnify Fulcrum. Then, by way of a fresh information, there was an offer by Tunku Jaafar Nong to purchase the entire shares of Merbok Hilir Bhd and that offer is still subsisting. Again, the defendants did not dispute the subsisting offer by Tunku Jaafar Nong and it would be extremely doubtful whether an offer of the same kind would materialise in the near future. All these were the submissions of Mr. M. Pathmanathan.

The not happily worded letter was alluded to by Mr. M. Pathmanathan. He submitted that that letter was clearly worded. By that letter, Fulcrum agreed to an extension subject to two conditions to be met and since it was not met, the recall should be made and which recall was due on 9 October 1997. He submitted that no one was under a misapprehension in regard to that letter. He submitted that Dato' Samsudin is an accountant by profession and no one contended that Fulcrum was asking for a greater amount than what was due to Fulcrum. He submitted that in the Rahaz Action the matter had been clarified as reflected in encl. 7 thereof – particularly, at para. 5.7 where there was reference to RM13,719,512 and it was said that this sum was not for a second repayment of interest but rather it was for the repayment of that portion of the loan which was used to pay the upfront interest. This meant, according to Mr. M. Pathmanathan, that the sum of RM62.5 million would be left and this was the sum that should be rolled over for 6 months. It was for these reasons that Mr. M. Pathmanathan submitted that there was an ample justification for this court to direct the sale of the Merbok Hilir Berhad shares and for the proceeds of such sale to be preserved in an interest bearing joint account of both solicitors.

In regard to the sum of RM37.25 million which Dato' Samsudin had to fortify by virtue of the amended prayer (2) of encl. 44, it was the submission of Mr. M. Pathmanathan that this figure was not snapped up from the air, so to speak, but rather it was supported by a letter of demand dated 31 December 1997 as reflected in exh. P14 of encl. 3. With these varied submissions, Mr. M. Pathmanathan then craved for an order in terms of encl. 44.

While Dato' V. Sivaparamjothi had nothing useful to add, Mr. Manjit Singh took center stage when he submitted that the undertaking by Dato' Samsudin was lacking in "powder and shot". He submitted that what really put the last nail in the coffin, so to speak, was when by the effluxion of time, taking the defendants' case at its highest level, the loan became repayable on 9 April 1998 and on this point alone the defendants have no defence at all. He took exception to the defendants' arguments when the defendants said through Madam DR John that once the term loan was cancelled and upon the failure of Fulcrum to agree to the roll over then Dato' Samsudin was relieved from the facility agreement. He strenuously argued that the defendants are obliged in law to pay the principal loan as well as the interest. He said it was a simple case of loan borrowing but made complicated by red herrings thrown here and there. It was, according to him, a simple case of arithmetic – of mere calculation. He submitted that at the end of the day, it was a simple case of taking the principal amount that was disbursed and multiply it by 18% per annum and times by the number of days that the loan was unpaid and that would be, in a nutshell, the claim of Fulcrum. He too submitted that the defendants' counterclaim can be heard at the trial if the court is persuaded it can be set-off. In serious vein, he then submitted that it was imperative to sell the shares so as to mitigate everybody's loss and secure the funds in the joint fixed deposit account of both solicitors and then proceed to trial.

Madam DR John, in rebuttal, submitted that Fulcrum was re-litigating. She submitted that Fulcrum had calculated the sum required to be fortified by Dato' Samsudin at the bar. She submitted that the defendants were not accorded the opportunity to ascertain whether the sum to be fortified was the correct amount or for that matter whether there was a need for fortification in the first place. She submitted that the not happily worded letter was null and void. In the same breath, she submitted that the defendants must pay the term loan facility.

Due to the constraint of time, the matter was then adjourned to the next day.

Enclosure 44 (The Hearing On 22 August 2000)

Madam DR John continued with her submission. She emphasised the following points:

(1) that there was no change in the circumstances to warrant the sale of the Merbok Hilir Berhad shares nor was there a need for fortification by Dato' Samsudin;

(2) The crux of Fulcrum's application in encl. 44 was to set aside the injunction;

(3) Fulcrum was protected under s. 176 of the Companies Act 1965 and its financial position was weak;

(4) that Dato' Samsudin was in a healthy financial position;

(5) the question of default by the defendants ought to be ventilated at the trial proper; and

(6) to sell the shares of Merbok Hilir Berhad would render the injunction that was granted on 16 December 1998 by James Foong J sterile and ineffective.

and for these reasons she prayed that encl. 44 be dismissed with costs.

Mr. M. Pathmanathan replied and he submitted that the whole defence and counterclaim of the defendants rested on the premise that Fulcrum had agreed to an extension of six months. He reiterated that encl. 68 was unrebutted and this meant that the offer by Tunku Jaafar Nong stood on firm ground. He too reiterated that the proceeds of sale of Merbok Hilir Berhad shares and the fortification by Dato' Samsudin would be deposited in the joint accounts of both the solicitors pending the trial and he too sought for costs for Fulcrum. On his part, Mr. Manjit Singh agreed with what Mr. M. Pathmanathan had submitted.

I have set out in extenso the submissions of all the parties in this rather long judgment. The central issues, within a narrow compass, would be on the amended prayers (1) and (2) of encl. 44 and I certainly agree with the submissions of both Mr. M. Pathmanathan, and Mr. Manjit Singh on those central issues. I have no desire to repeat their very sound submissions again. It was my judgment, that once leave had been obtained by Fulcrum to sell the shares of Merbok Hilir Berhad the question of contempt of James Foong J.'s order dated 16 December 1998 no longer arise. Fulcrum had rightly sought leave to sell those shares and I have no hesitation in granting the leave that was required. It was also my judgment, that Dato' Samsudin must fortify his undertaking as to damages. An empty undertaking as to damages would be worthless in the monetary sense. If Dato' Samsudin was indeed in a healthy financial position as he made himself out to be, then there would not be any difficulty for him to fortify his undertaking as to damages to the tune of RM37.25 million. Fortification of an undertaking as to damages must be

developed by our courts vigorously. Gone are the days where an undertaking as to damages would be given without regard to the need to fortify such an undertaking. In regard to encl. 44, I made the following orders:

(1) Order in terms of encl. 44 particularly para. (1) as amended and para. (2) as amended.

(2) The proceeds of the sale as per para. (1) as amended of encl. 44 and the fortification as per para. (2) as amended of encl. 44 to be deposited in the joint accounts of both the solicitors pending the trial.

(3) That costs should rightly go to Fulcrum.

Immediately after I made these orders, Mr. M. Pathmanathan made an oral application for the preliminary issue to be determined by this court. According to him that preliminary issue would be in this fashion: whether a binding agreement was reached between the parties for the roll over of the loan for a further six months until 9 April 1998? He advanced a reason for his proposition: he said that it would save the parties time and expense as the entire defence and counterclaim of the defendants hinged on the preliminary issue. Indeed, even James Foong J in his written decision dated 16 December 1998 alluded to the preliminary issue when his Lordship said (see exh. "A5" of encl. 79):

> Undoubtedly the issue between these 2 parties involves the question of whether the loan was rolled over.

Mr. M. Pathmanathan submitted that in the event the preliminary issue is decided in favour of Fulcrum, then the entire defence and counterclaim would fail. It was, according to him, a short issue that requires the construction of certain documents. He then alluded to O. 33 r. 2 of the Rules of the High Court 1980 ("RHC") and he submitted that by virtue of that order this court is empowered to determine the preliminary issue. It was his submission that the present case revolves on that preliminary issue and there was no requirement to file a formal application under O. 33 r. 2 of the RHC.

Madam DR John responded and she submitted that she had no instructions from her clients in regard to the preliminary issue. In the premises, she sought for an adjournment in order to seek instructions from her clients.

Mr. Manjit Singh pointed out to the court that under O. 33 r. 2 of the RHC, the court may, acting on its own motion, order the preliminary issue to be tried and to give directions for the trial of the preliminary issue. There was, according to him, no necessity to file a formal application under O. 33 r. 2 of the RHC by any party. Mr. Manjit Singh also drew the court's attention to the defendants' application in encl. 47 which was supposed to be for mention and in encl. 47, the defendants sought for the following prayers:

(1) An order that the plaintiff, their directors, servants and/or agents do immediately furnish the defendant Dato' Samsudin Abu Hassan and Rahaz the intervener the proxy forms in order to enable the defendant and the intervener to appoint proxies to attend and exercise their voting rights at the annual general meeting of Merbok Hilir Berhad to be held on 14 March 2000.

(2) An order that the plaintiff their directors, servants and/or agents be restrained from commenting and/or representing, pending the disposal of the trial, that Rahaz Sdn Bhd is in default of its obligations under the term loan facility agreement dated 9 October 1996.

(3) That the plaintiff their directors, servants and/or agents observe the terms of the order of court dated 16 December 1996.

(4) That the costs of this application be paid by the plaintiff.

(5) Such other relief as this Honourable Court deems fit to grant.

In response, Madam DR John said that she needed time to revert to her clients in regard to encl. 47. She then suggested a date for the matter to be adjourned and that would be on 25 August 2000. This court agreed with her suggestion.

The Session On 25 August 2000

Mr. M. Pathmanathan informed the court that Madam DR John was supposed to contact her clients in regard to the preliminary issue under O. 33 r. 2 of the RHC. Madam DR John replied that she had written to Dato' Samsudin who in turn had instructed her to file an appeal and to file for a stay. According to Madam DR John, Dato' Samsudin said that he would not be free in September 2000 and that he would revert back to her in regard to the narrowing down of the issue. According to her, today would be the hearing of the stay in encl. 80 supported by an affidavit in encl. 79 and she said that she had served the papers on the solicitors on record. Mr. M. Pathmanathan took exception to the submissions of Madam DR John. He urged this court to act expeditiously in fixing the hearing of the preliminary issue in the month of September 2000. He submitted that Dato' Samsudin did not give his instructions in regard to the narrowing down of the issue yet he was able to file a lengthy affidavit for a stay. It was his submission that it was incumbent on the part of the defendants to respond and that the defendants cannot simply adopt the stand of not giving any instructions in regard to the preliminary issue. He submitted that Dato' Samsudin was prepared to say that any date before November 2000 was not suitable to him and this attitude clearly supported Fulcrum's allegation of delay perpetrated by the defendants. He reiterated that the determination of the preliminary issue may well decide, once

and for all, the defence and the counterclaim. It was therefore just, expeditious and convenient for this court to fix the hearing of the preliminary issue. Mr. M. Pathmanathan framed the preliminary issue in this way:

> Whether there was a binding agreement reached between the parties to roll over the loan given by the plaintiff for a further period of six months expiring on 9 April 1998?

Both Mr. Manjit Singh and Dato' V. Sivaparamjothi had nothing to say. Madam DR John became magnanimous and with a sudden change of heart she said:

> I agree to the narrowing of the preliminary issue as proposed by Mr. M. Pathmanathan.

But she added that there is an additional issue as to whether the notice of demand dated 31 December 1997 was invalid and therefore null and void. This prompted a fierce reply by Mr. M. Pathmanathan. He submitted that there was no double claim and the defendants did not say that the claim was far in excess than the actual amount due. It was, according to him, a misdescription of RM13,719,512 when it should be read as an interest portion of the loan. He submitted that even James Foong J agreed to the preliminary issue as framed. Madam DR John again relented and said:

> I once again agree to the narrowing of the issue and to the issue as proposed by Mr. M. Pathmanathan. I say that I agree that the narrowing down of the issue as framed by Pathma would decide the whole case once and for all, Y.A.

However, she submitted that the narrowing down of the issue could still be heard on the scheduled date of hearing, namely, between 20 November 2000 right up to 30 November 2000. To this, Mr. M. Pathmanathan had this to say. She agreed to the narrowing down of the issue but she disagreed that the hearing of that issue be brought forward to September 2000. He stressed that the interest incurred on a daily basis for the loan is RM34,000 and it would be in the defendants' welfare to have an early trial date. He submitted that since she agreed to the preliminary issue then it would be ideal for that issue to be heard first in order to minimise the daily interest payable by the defendants. Madam DR John replied and she categorically said that Dato' Samsudin is not free in September and October 2000 and that should not be construed against him. In relation to the daily interest of RM34,000 it was something that both parties should bear. She then rounded up her submission by craving the court's indulgence to hear the preliminary issue in November 2000 and not in September and October of 2000. Mr. M. Pathmanathan

submitted it was entirely up to the court to fix a particular date for hearing and the court ought not to be concerned as to whether a particular date is suitable to a witness or otherwise.

It would be germane, at this juncture, to examine the ramifications of O. 33 r. 2 of the RHC. It states as follows:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

and the court certainly has the wide discretion to order the preliminary issue as framed to be tried even before the trial of the cause or matter. The preliminary issue as framed can conveniently be said to be "partly of fact and partly of law" and it is not a fictitious question. All the interested parties are present and it would be ideal to adjudicate on the preliminary issue as framed. According to *Bright v. Tyndall* [1876] 4 Ch D 189 and *Sumner v. William Henderson & Sons* [1963] 1 WLR 823, CA, [1963] 2 All ER 712, CA, the court will decline to hear fictitious questions where the events had not happened. It must be borne in mind that "any question or issue" that calls for determination need not arise from the pleadings but it may surface through some other means and this is made possible by the existence of the phrase "or otherwise" that appears in O. 33 r. 2 of the RHC. Fortunately, the preliminary issue as framed arose from the pleadings as well as through the documents that were referred to by the parties in the course of their arduous submissions. The preliminary issue as framed was not only bandied around by the parties during their submissions but it was also alluded to by James Foong J in his written judgment as adverted to earlier.

Reverting back to the case of *Bright v. Tyndall (supra)*, Malins VC was confronted with a special case to interpret the will of Mr. Tyndall, a well known banker at Bristol who died leaving a very large fortune and six daughters who survived him and who were all alive at the material time. The property of Mr. Tyndall was to be distributed in this way: "After the death of his daughters, the share of each daughter is given to the sons of the daughters who shall attain twenty-one, and to the daughters of the daughters who should marry under twenty-one, omitting the usual provision that the property shall vest in daughters who attain twenty-one or marry under that age." A question was posed under a special case for his Lordship to decide: Whether in the event of a daughter having daughters who attain twenty-one, and do not marry before, do they take a vested interest? Malins VC declined to decide the question as he was of the view that it would be injurious to the

parties to decide the question until the events actually happened which would give rise to the question. At p. 197 of the report, Malins VC had this to say:

> Now, the inconvenience of deciding such cases as this by anticipation is manifest. Suppose I were to come to the conclusion that no daughter that does not marry under twenty-one can take an interest, then I have taken away from the daughter, if such an event should arise, the chance of making the best she can of such a case when it does arise; and I have by anticipation made a declaration that she does not take an interest when there is no occasion for doing so whatever. The only reason suggested to me is that these young ladies when they marry ought to know whether the sons and daughters are to take, or whether only the daughters of a particular class are to take, *viz*., those who marry under twenty-one. I cannot regard that as a circumstance which renders it absolutely necessary that this question should now be decided. That the court will not, in all cases, decide such questions as a matter of course is most formally decided in *Garlick v. Lawson* 10 Hare, App., xiv by Vice-Chancellor Wood, the same learned Judge who decided *Bell v. Cade* 2 J. & H. 122.

and the headnote merits reproduction where it states that:

> Upon a special case to obtain a decision whether persons not in esse would be entitled, under certain circumstances which might never arise, to a share in property, the Court declined to decide the question, being of opinion that it would be injurious to the parties to have that decision until the events should happen which would give rise to the question.
>
> Where the interests of the parties to a special case are not of such a nature as to give the Court jurisdiction to decide the questions, the Court will not feel itself bound to decide upon a fictitious interest created for the express purpose of obtaining a decision.

Factually speaking the facts in *Bright v. Tyndall (supra)* can readily be distinguished. There the special case was posed when the events had not occurred as yet. Here, on the other hand, the preliminary issue as framed arose from a set of facts where the events had occurred. There the Act of Sir George Turner contained the following provision:

> Provided, also, that if, upon the hearing of such special case as aforesaid, the court shall be of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case, the said court may refuse to decide the same.

Here, O. 33 r. 2 of the RHC do not contain such a provision. However, O. 33 r. 5 of the RHC makes for an interesting reading; it states as follows:

> If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately form the cause or matter substantially

> disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

In *Sumner v. William Henderson & Sons Ltd (supra)*, a special case was submitted by the parties and the court had to decide the following preliminary questions of law for its opinion:

(1) whether the defendants as employers could be liable for any negligence of the skilled and competent persons who had supervised and carried out the specialized work involved in the construction of the building which required skill and knowledge not possessed by the defendants; and

(2) whether they could be held liable for any negligence by a reputable manufacturer of the cable.

Sumner claimed damages under the Fatal Accidents Act 1846 to 1959, in respect of the death of his wife who was employed by the defendants as restaurant supervisor in the defendants' store. Fire broke out in that store and his wife was asphyxiated by smoke in the course of her employment. The cause of the fire was not agreed upon by the parties. Phillimore J (see [1963] 1 All ER 408) determined the questions of law raised by the special case and he held that the defendants would be liable in law for any negligence of certain contractors and electrical engineers. The defendants appealed and the Court of Appeal (Sellers, Donovan and Russell LJJ) allowed the appeal and Sellers L.J. delivering the judgment of the Court of Appeal had this to say (see p. 713 to p. 714 of the report):

> In the present case no facts have been agreed and what the outcome of the evidence will be is most uncertain. It does not seem to us in the interests of either party that a hypothetical decision should be reached now. It might tie one or other of the parties to a decision which the facts might reveal as erroneous. Time is running out against possible claims against other parties, either directly by the plaintiff or as claims over for indemnity by the defendants, and we do not think that a decision now on the matters raised will satisfactorily relieve the parties from protecting themselves accordingly.
>
> In our view the procedure by this special case was wrong; no judgment should have been given under it and it cannot properly be further pursued. We therefore, on this ground only, set aside the judgment given, so that the parties are free to argue the legal position on established facts, and we proceed no further with this appeal.

Now, the marked differences between the present case and that of Sumner would be this. Here Fulcrum had extended the loan under the facility agreement to the defendants and the defendants agreed that they must pay the

loan. The preliminary issue as framed arose out of the submissions of the parties and it was agreed upon by Madam DR John who acted for the defendants and the same preliminary issue was alluded to by James Foong J. in his written judgment. The fact of borrowing was an established fact and this was never denied by the defendants. Whereas in *Sumner*'s case, the cause of the fire was hotly disputed by the parties and Sellers LJ was right in allowing the appeal by the defendants because the preliminary questions of law as framed would shackle the parties and prevent them from arguing "the legal position on established facts.

In *Radstock Co-operative And Industrial Society Ltd v. Norton-Radstock Urban District Council* [1968] 1 Ch D 605, the Court of Appeal (Harman, Russell and Sachs LJJ) while deploring the method of adjudicating the case on a preliminary point upheld the decision of the trial judge and dismissed the appeal. Harman LJ, for instance, writing a separate judgment, at p. 624 of the report, had this to say:

> The defendants demurred to that claim, and an order was made on July 15, 1966, stated to be pursuant to R.S.C., Ord. 33, r. 3, directing the setting down of the following issue to be disposed of before the trial, namely:
>
> > Whether on the footing that all the allegations of fact contained in the statement of claim in this action (so far as not admitted in the defence) can be proved the plaintiffs can as a matter of law be entitled to damages or an injunction as claimed in their statement of claim.
>
> Ungoed-Thomas J. heard argument on this issue and came to the conclusion that the defendants were right, or, in other words, that the statement of claim showed no cause of action, and he dismissed the action under R.S.C., Ord. 33, r. 7. The plaintiffs appeal.
>
> At this juncture, I should like to protest against this method of procedure. This is not a preliminary point at all. It deals with the whole subject-matter of the action, and without any evidence, and the court is left in a most unsatisfactory position and has to guess at many things which, on a hearing, would be properly proved in evidence. The procedure proper to this kind of situation is by way of motion to strike out the statement of claim as showing no cause of action. That is a well-known method of putting an end to actions without substance, but it is also well known that the court will only strike out a statement of claim in plain cases where it is clear that the action cannot possibly succeed. That procedure would be entirely unsuitable to a case like the present, in which more than a score of authorities have been cited and argument has lasted over five days. Still, we are now confronted with a position in which both parties have acquiesced.

Finally, Harman LJ rounded it up by saying at p. 628 of the report:

> For all those reasons, while deploring the method by which the action has been conducted, I cannot but come to the conclusion that the statement of claim discloses no valid cause of action, and the case was, therefore, rightly dismissed by the judge as he had power to do under rule 7 of Order 33.

Here, the preliminary issue as framed would be tried in open court where the parties have the right to call witnesses. The full rigmarole of the trial will be conducted in adjudicating the preliminary issue as framed. Everything will be placed above board for the scrutiny of everyone. It would be pointless to have O. 33 r. 2 of the RHC as part and parcel of our procedure if we do not give effect to it. The Rules Committee saw it fit to incorporate this procedure in the RHC and this court must give effect to it. The preliminary issue as framed had a mixture of fact and law – all nicely framed to be adjudicated upon. This was my judgment and I so hold accordingly.

Chong Siew Fai J (as he then was) in *Huang Ee Hoe v. Tiong Thai King* [1991] 1 MLJ 51, 54 had this to say of preliminary issue:

> Finally, for the plaintiffs/respondents, it was urged upon me that if the application were to be allowed, the preliminary issues be dealt with at the commencement of the trial of this action. I am unable to accept this. Leaving the issues for disposal at the commencement of trial of the main action necessarily means that all are set for the trial including the subpoena and presence or attendances of witnesses of both sides in participation of the trial to proceed. On the other hand, if the preliminary issues are disposed of in advance, preparatory works for the trial as aforesaid may or may not be necessary dependent upon the result of the present application. An early disposal of the present application would undoubtedly place parties in a clearer position as to whether anything needs be done in the conduct of the case, and is, in my opinion, to be preferred.
>
> As stated by Lord Denning MR in *Carl-Zeiss-Stiftung v. Herbert Smith* [1968]2 All ER 1002 at p 1004:
>
> The true rule was stated by Romer LJ in *Everett v. Ribbands* [1952] 2 QB 198.
>
> Where there is a point of law which, if decided in one way, is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards.
>
> I have always understood such to be the practice.

Chan Sek Keong J speaking for the Singapore's Court of Appeal in *Federal Insurance Co v. Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390, 397 explained the law in this way:

> Taking all the points made by counsel for the appellants, we may state as a general rule that the court will not exercise its power under O. 33 r. 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point, unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). It is a matter of discretion for the court to exercise in the circumstances of each case, bearing in mind that 'Preliminary points of law too often are treacherous short cuts. Their price can be … delay, anxiety and expense' (per Lord Scarman in *Tilling v. Whiteman* [1979] 2 WLR 401; [1979] 1 All ER 737, at p 410).

Indeed it was a matter of discretion to decide whether the preliminary issue as framed ought, in the circumstances of this case, to be heard by me. James Foong J. in a well considered judgment also held that there was indeed the issue of whether the loan was rolled over. A time saving device as envisaged by O. 33 r. 2 of the RHC must be resorted to.

Having heard the submissions of the parties, I then made the following orders:

> By virtue of Order 33, rule 2 of the RHC, this court orders that the following issue of:
>
> > Whether there was a binding agreement reached between the parties to roll over the loan given by the plaintiff for a further period of six (6) months expiring on April 9, 1998?
>
> to be heard on 25, 26, 27, 28 and 29 September, 2000.

Madam DR John then drew my attention to the summons in chambers in encl. 80 for a stay of the orders of this court dated 22 August 2000 pending the appeal by Dato' Samsudin and Rahaz Sdn Bhd. Enclosure 80 was supported by an affidavit of A. Aziz bin Ismail that was affirmed on 24 August 2000 as seen in encl. 79 and according to Madam DR John the other side was interested in responding to encl. 79.

Mr. Manjit Singh submitted that the sealed copies of encls. 80 and 79 were served on them yesterday afternoon at about 3.10 p.m. and he said that he needed time to prepare the affidavit in reply. He drew my attention to the fact that the last day for fortification of the undertaking as to damages by Dato' Samsudin would be on 5 September 2000. He said that he would be going overseas on 30 August 2000 and that he would be back on 2 September 2000 and thereafter, upon his return, he would be preparing the affidavit in reply.

Madam DR John while leaving the matter to the court to decide also craved the indulgence of the court to give the next return date before 5 September 2000 in view of the fact that Dato' Samsudin was supposed to fortify his

undertaking by 5 September 2000 and therefore she rightly said that it was ideal that encl. 80 be heard before 5 September 2000. I then fixed encl. 80 for hearing on 4 September 2000 at 2.30 p.m.

In the meantime, Madam DR John withdrew encl. 47. Dato V. Sivaparamjothi responded and he submitted that he had prepared an outline of his submission in regard to encl. 47 and he too had prepared and compiled the bundle of authorities in anticipation of the hearing of encl. 47. He stressed that he had worked overtime, burning midnight oil, so to speak, and since the withdrawal of encl. 47 was done at the last minute, he was constrained to ask for costs. Madam DR John then proposed that costs be in the cause. She submitted that since encl. 44 had been granted by the court, then encl. 47 had become academic. Alternatively, she prayed that there be no order as to costs. Dato' V. Sivaparamjothi pointed out that had encl. 47 be proceeded with, it would have provoked interesting questions of law and he again requested that costs be ordered. I acceded to the request of Dato' V. Sivaparamjothi for the reasons alluded to by him and, accordingly, I struck out encl. 47 with costs.

The Session On 4 September 2000 At 2.30 p.m.

This session was for the hearing of encl. 80 and Madam DR John, for openers, informed this court that she had just filed a summons in chambers to injunct Fulcrum from selling the Merbok Hilir Berhad shares until the hearing of the appeal to the Court of Appeal. She said that she had filed the summons in chambers at about 11.37 a.m. this morning (referring to 4 September 2000). She said that the summons in chambers which she had just filed was entirely different from encl. 80. She reiterated that encl. 80 was supported by an affidavit in encl. 79. The affidavit in reply to encl. 79 was filed on 1 September 2000 and it was affirmed by Lum Sing Fai on the same day as seen in encl. 83. According to Madam DR John, the reply to encl. 83 can be seen in encl. 84 which was an affidavit affirmed by A. Aziz bin Ismail on 4 September 2000.

Mr. M. Pathmanathan pointed out that encl. 84 was in fact an affidavit which was filed in support of the summons in chambers as alluded to by Madam DR John for the purpose of injuncting Fulcrum from selling those shares. The registry has since marked that summons in chambers as encl. 88. According to Mr. M. Pathmanathan, Madam DR John stressed that encl. 88 was supported by encl. 84 and in addition to that she also emphasised that encl. 84 was in response to encl. 83. According to Mr. M. Pathmanathan, encl. 84 was only served at 12.20 p.m. on 4 September 2000 and he has not read it nor taken instructions on the matter. Mr. M. Pathmanathan then proceeded to say that encl. 80 was an application for the stay of execution of the order of this court dated 22 August 2000 in respect of encl. 44. He repeated that on 22 August 2000, I had made two crucial orders:

(1) for the sale of 29.25 million Merbok Hilir Berhad shares pledged by Rahaz Sdn Bhd and Dato' Samsudin; and

(2) for the fortification by Dato' Samsudin in the form of cash in the sum of RM37.25 million within 14 days from 22 August 2000 and the last date would be by tomorrow, *ie*, on 5 September 2000.

Mr. M. Pathmanathan then submitted that his instructions were simply not to object to a stay in respect of the fortification to be given by Dato' Samsudin in view of the fact that the trial of the preliminary issue had been fixed in the later part of this month. In short, Fulcrum consented to the stay of the fortification.

But, in regard to the order for the sale of 29.25 million Merbok Hilir Berhad shares pledged to Fulcrum where the defendants had sought for a stay, Mr. M. Pathmanathan submitted that it had now become academic because those shares have been sold and the sale completed with the full purchase price having been paid. At the bar he showed an original letter which clearly recorded that Fulcrum had received the full sum of RM67,275,000 and the monies have since been kept in the Arab Malaysian Bank Bhd pending the opening of the stakeholders account in the joint name of Messrs Sri Ram & Co and Messrs Atma Singh Veriah & Co. For that reason, he submitted that the issue of a stay of the order of this court pertaining to the amended prayer (1) of encl. 44 had become academic and so he sought the directive of this court that the sum of RM67,275,000 be placed in the joint account of Messrs Sri Ram & Co and Messrs Atma Singh Veriah & Co in Arab Malaysian Bank Bhd.

Mr. Manjit Singh had nothing to add but Madam DR John in serious tone submitted that Fulcrum had surreptitiously entered on 28 August 2000 for the sale of those shares. She submitted that it was sub-judice (a term of general import to describe the fact that an issue is before a court for its determination) and that it was done in bad faith. She too submitted that the request to file the affidavit in reply to encl. 79 was made *mala fide*. She adamantly wanted to proceed with the hearing of encl. 80.

In rebuttal, Mr. M. Pathmanathan submitted that, on 25 August 2000, Fulcrum was served with encls. 80 and 79 and had asked for time to reply. He submitted that Madam DR John had asked for the hearing of encl. 80 to be heard before 5 September 2000 principally because Dato' Samsudin had to deposit the fortification in cash within 14 days and Fulcrum had agreed to take 4 September 2000 in spite of Fulcrum's right to reply within 14 days. Mr. M. Pathmanathan took exception to Madam DR John's submissions that Fulcrum had surreptitiously entered into the sale of the shares on 28 August 2000 and that the sale was sub-judice and in bad faith and that the request to

reply to encl. 79 was made *mala fide*. Mr. M. Pathmanathan, in style, submitted that the law was quite trite. An appeal would not operate as a stay and a *fortiori* an application for a stay, like encl. 80, would not prevent Fulcrum from selling those shares. In *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40, NH Chan J (as he then was) aptly said at p. 42 left hand column at E of the report:

> An appeal does not operate as a stay of execution.

Even in *Puncak Klasik Sdn Bhd* [1996] 4 MLJ 533, at p. 543 of the report, I vigorously applied the case of *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd (supra)* when I reproduced the speeches of NH Chan J (as he then was) in that case in this way:

> As NH Chan J (now JCA) said in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 3 MLJ 40 at page 43:
>
> > Merits or strong grounds for an appeal are also not special circumstances. In *Atkins v. GW Ry* [1886] 2 TLR 400, Lord Esher MR said:
> >
> > > ... but that there were strong grounds for an appeal was no reason, for no one ought to appeal without strong grounds for doing so.'
>
> In another part of his judgment, NH Chan J (now JCA) in the same case said at page 43 right hand column at E:
>
> > In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances.

One also must not forget that the successful party should not be deprived of the fruits of his litigation (per Mohd Noor Ahmad J in *Bidang Cerdas Sdn Bhd v. Sayfol Management Sdn Bhd* [1998] 2 CLJ Supp 7).

Reverting back to the mainstream of the case, Mr. M. Pathmanathan submitted that on 25 August 2000 the defendants should have applied for an interim stay pending the disposal of encl. 80 which they did not do and hence it was not open to them to say and submit that the sale was surreptitiously conducted. Mr. M. Pathmanathan was right when he submitted that the sale of those shares were made pursuant to an order of this court and he too was right when he said that this court had varied the injunctive order of James Foong J dated 16 December 1998 by allowing the sale and, consequently, all other ancillary powers necessary to effectuate the sale were also granted in order to give the orders of this court its potency. He strenuously maintained that encl. 80 had become academic and he was indeed correct in adopting this line of submission. In my judgment, the sale of the Merbok Hilir Berhad shares have been completed by the payment of the full purchase price. As a magnanimous gesture, Mr. M. Pathmanathan submitted that Fulcrum had kindly consented

to the stay of the fortification in so far as the amended prayer (2) of encl. 44 was concerned.

Going on an uphill task, Madam DR John finally conceded and agreed that an appeal would not operate as a stay. Nevertheless she submitted that the fact that there was an application for a stay should be considered. She submitted that on 25 August 2000 when encl. 80 came up for hearing and for want of time Fulcrum had requested for time to file an affidavit in reply and this was done, according to her, solely for the purpose of frustrating the defendants' application in encl. 80. She then continued to submit and she had the audacity to say that she doubted whether the sale actually took place.

Quick on the uptake, Mr. Manjit Singh replied. It was his submission that Fulcrum had consented and agreed to the stay of the fortification pending the hearing of the preliminary issue this September. That would, according to him, put an end to Madam DR John's anxiety that tomorrow (meaning 5 September 2000) was the last date for the fortification of the undertaking by Dato' Samsudin. There was therefore no real urgency for encl. 80 to be heard immediately. Of pertinence would be the following submissions of Mr. Manjit Singh and this was what he said:

> I must object that she had cast some aspersions that I took the adjournment and in the interim period my client had surreptitiously conducted the sale and by inference she is saying that I am abetting the plaintiff (referring to Fulcrum) in selling those shares.

He then added that he was not the solicitors who handled the sale of the shares. He too submitted that the plaintiff and the defendants are hard core businessmen who would show no mercy between themselves. He also submitted that the defendants have no presence of mind to apply orally for an interim stay on 20 August 2000. That being the case, he submitted that there was no legal impediment for Fulcrum to enter into the sale of those shares or even to complete the sale of those shares especially when there was an existing order to sell those shares – and that would be, according to him, the true legal position governing the sale of those shares under para. (1) of encl. 44. He too submitted that the defendants have themselves to blame.

Mr. Manjit Singh pointed out that there were allegations in encl. 84 which were distasteful and those allegations must be replied to in order to set the record straight. He was particularly unhappy with the averments in paras. 5 (d), 6(b), 6(c), and 6(d) of encl. 84 and for convenience these paragraphs would now be reproduced.

> 5(d) I am advised by the Solicitors for the Defendant and the Interveners and verily believe that when the application for stay came up for hearing

before His Lordship Counsel for the Plaintiff applied for an adjournment for the specific purpose of filing an affidavit in reply.

6(b) I am advised by the Solicitors for the Defendant and the Interveners and verily believe that the Plaintiff's Solicitors have used the adjournment granted by the Court specifically to enable the Plaintiff to file an Affidavit in Reply to frustrate the Defendant's application for a stay by purporting to enter into the alleged agreement to sell the said shares.

6(c) I am advised by the Defendant Solicitors and verily believe that the act of entering into the alleged agreement to sell is sub-judice in the light of the extension of time granted to file the Affidavit in Reply to the pending application for stay.

6(d) I am advised by the Solicitors for the Defendant and the Interveners and verily believe that on hindsight it would appear that the request for the adjournment to file the Affidavit in Reply and the length of time requested for the same was done in bad faith.

he then continued to submit and he said that he was under the impression that the matter was now academic and encl. 80 should not be heard. He said that he was contemplating to apply to strike out encl. 84. In serious view he said:

I have been called a scoundrel and I think I need to vindicate my name and I therefore pray for time to file an affidavit in reply.

Mr. M. Pathmanathan submitted that whether it was academic or otherwise, this court was empowered to make the order that Dato' Samsudin provide the fortification until the hearing of the preliminary issue on 25 September 2000 till 29 September 2000 or until further order by this court.

Madam DR John was still stubborn. She submitted that as far as the defendants were concerned they still maintained that no sale of the shares had taken place and that the sale and purchase agreement exhibited by Fulcrum in exh. "P1" of encl. 83 was a sham. It was a bogus transaction. She was not prepared to accept the fact that a sum of RM67,275,000 had been paid. She emphasised that encl. 80 was not only for a stay of the fortification, it was also for a stay of the sale of the shares to a third party and that the sale and purchase agreement as exhibited in encl. 83 did not show that the sale had taken place. The defendants referred to cll. 4, 7 and 8 of the sale and purchase agreement as per exh. "P1" of encl. 83 to drive home the point that the *bona fides* of the sale of those shares were in doubt. She then alluded to an individual buyer in the person of Tunku Jaafar Nong whose name was alluded to by Fulcrum in the course of the submission of encl. 44, yet Kilang Bumi-Aluminium Sdn Bhd turned out to be the purchaser of those shares. She submitted that within

a span of four days Fulcrum managed to bring forth a purchaser who was willing to purchase those shares for RM67,275,000. She urged this court to entirely disregard exh. "P1" of encl. 83 and to proceed with the hearing of encl. 80. She also urged this court to allow encl. 80. She then drew the court's attention as to the willingness of Fulcrum to consent to the stay of the fortification until the hearing of the preliminary issue or until further order of this court and she submitted that such willingness on the part of Fulcrum had not been transmitted to the defendants prior to this and it was only today (referring to 4 September 2000) that this was conveyed to the defendants and this too was done in chambers before this court. She submitted that the move by Fulcrum was simply to placate Dato' Samsudin but the damage had already been done. According to her, Dato' Samsudin's concern in regard to the Merbok Hilir Berhad shares were just as important as the extension of time for the fortification. She again urged this court to proceed with the hearing of encl. 80.

Mr. M. Pathmanathan responded and he said he was baffled as to how it can be suggested that there had been no sale of those shares for RM67,275,000. He submitted that I had before me the original letter dated 1 September 2000 which clearly stated that the money had been paid and placed in a fixed deposit; and it too stated in no uncertain terms that upon notification the money will be placed in the joint account of both counsel. He too submitted that there was no need for Fulcrum to placate Dato' Samsudin. Fulcrum had two orders emanating from this court. He submitted that Dato' Samsudin was required to fortify his undertaking. He bluntly submitted that Dato' Samsudin was asked "to put in his money where his mouth is." He then submitted that he thought that on 25 August 2000 Dato' Samsudin's main concern was to cough out the monies for fortification. He submitted that the defendants were happy to pledge the Merbok Hilir Berhad shares with Fulcrum as security for the loan. That being the case, so the submission went, the defendants should not complain. In the first place, if the defendants felt that those shares were very valuable and so dear to their hearts, why did they pledge those shares. Mr. M. Pathmanathan then proceeded to submit in regard to the offer to stay the fortification. He said that it was not true that Madam DR John had heard of the offer for the very first time today (referring to 4 September 2000). He submitted that last Friday (referring to 1 September 2000), he had called the office of Messrs Atma Singh Veriah & Co and he had asked to speak to Madam DR John. Since she was indisposed, he had spoken to Mr. Atma Singh and had asked him whether Dato' Samsudin would be comfortable with a lesser sum than RM37.25 million as ordered by this court. Mr. M. Pathmanathan told Mr. Atma Singh that he would try to prevail on the solicitors for Fulcrum who in turn will try to prevail on their clients. Mr. Atma Singh then requested for the hand phone number of Mr. M. Pathmanathan and

Mr. Atma Singh promised that he would try to get Dato' Samsudin and thereafter would revert back by today (referring to 4 September 2000). It was, according to Mr. M. Pathmanathan, approximately 12.15p.m. on 4 September 2000 that Mr. Atma Singh telephoned and relayed the message to Mr. M. Pathmanathan that Dato' Samsudin was not responding to the offer. Mr. M. Pathmanathan further explained that before coming into the court's chambers, he had offered to Madam DR John to stay the fortification and she did not reply. He then rounded up by saying that:

(a) the order of this court on 22 August 2000 may be stayed in respect of the order for fortification by Dato' Samsudin pending the hearing of the preliminary issue or until further order.

(b) the sale of the shares had become academic and no order be made in regard thereto.

(c) in the event Madam DR John was still interested in proceeding with encl. 80 then Fulcrum would need time to reply to the affidavit in encl. 84.

Mr. Manjit Singh took the cue and he submitted that he needed time to reply to the affidavit in encl. 84. He said that tomorrow (referring to 5 September 2000) he would be engaged in the Court of Appeal. On 6 September 2000 he would be before another judge in Kuala Lumpur, while on 7 September 2000 he would be engaged in the Malacca High Court. He too informed the court that on 8 September 2000, Mr. M. Pathmanathan was not available and he finally suggested 11 September 2000 for the hearing of encl. 80. Madam DR John agreed wholeheartedly. This court acceded and fixed the date for the hearing of encl. 80 on 11 September 2000 at about 9.00 a.m. The notes of evidence clearly showed that this court also took note of two important events, namely:

(a) That 29.25 million shares of Merbok Hilir Berhad pledged to Fulcrum as security for the loan have been sold and the sale completed and that the full purchase price have been paid. Fulcrum had received the full sum of RM67,275,000 and the monies placed in the Arab Malaysian Bank Berhad pending the opening of the stakeholders account in the joint name of Messrs Sri Ram & Co and Messrs Atma Singh Veriah & Co.

(b) That Fulcrum by consent agreed that the fortification in cash of RM37.25 million which Dato' Samsudin must provide within 14 days from 22 August 2000 be stayed pending the hearing of the preliminary issue scheduled at the end of September 2000 or until further order of this court.

The Session On 11 September 2000 At 9.00 a.m.

Dato' Samsudin and Rahaz Sdn Bhd have changed their solicitors. Mr. Christopher Leong and Mr. Lim Tuck Sun were acting for both of them in regard to encl. 80. Mr. M. Pathmanathan and Mr. Manjit Singh continued to act for Fulcrum.

According to Mr. Christopher Leong he had just been engaged as solicitors for the matter. He informed the court that on 8 September 2000 he had just filed a notice of change of solicitors as seen in encl. 90. He said that it was on short notice and he realized that encl. 90 was incorrectly filed. The Samsudin Action and the Rahaz Action should have been consolidated together. He then prayed for a short date to enable him to take instructions and to appraise himself of the numerous affidavits that have been filed. Today – referring to 11 September 2000, was meant for the hearing of encl. 80. He then sought to make an oral amendment to prayer (1) of encl. 80 by adding the words "terhadap perintah Mahkamah yang mulia ini bertarikh 22 Ogos 2000" after the words "Bahawa semua perlaksanaan". Mr. M. Pathmanathan graciously agreed to the oral amendments to prayer (1) of encl. 80 and this court accordingly allowed those amendments. The amended prayer (1) of encl. 80 now reads as follows:

> Bahawa semua perlaksanaan terhadap perintah Mahkamah Yang Mulia ini bertarikh 22.8.2000 ditangguhkan sehingga rayuan Defendan dan Pencelah Pertama kepada Mahkamah Rayuan melalui rayuan terhadap perintah Mahkamah Yang Mulia ini bertarikh 22.8.2000 ditentukan.

I also took note of what Mr. Christopher Leong had said and which was confirmed by Mr. M. Pathmanathan to the effect that the fortification was to be stayed pending the trial of the preliminary issue or until further order of this court.

As agreed by the parties, the hearing of encl. 80 as amended was fixed on 13 September 2000 at 9.00 a.m.

The Session On 13 September 2000 At 9.00 a.m. In Regard To Encl. 80

Mr. Christopher Leong wanted to withdraw encl. 80 because he knew that it had become academic. He said that he had no choice but to withdraw encl. 80 and that the defendants would seek their remedies in some other ways. He too sought this court's indulgence not to order any costs in regard to the withdrawal of encl. 80. He faulted Fulcrum and he said it was at the behest of Fulcrum that encl. 80 had become academic. He said Fulcrum had acted to subvert the defendants' application in encl. 80. He submitted that paras. 5 (d), 6(b), 6(c) and 6(d) ought not to be expunged as they had not been tested nor argued in the courts.

Mr. M. Pathmanathan argued extensively and he craved that since the defendants were interested in withdrawing encl. 80, this court should strike out encl. 80 with costs to be given to Fulcrum. Mr. M. Pathmanathan also sought an order for this court to expunge the offending paragraphs in encl. 84 – the affidavit of A. Aziz bin Ismail, particularly paras. 5(d), 6(b), 6(c) and 6(d) thereof.

Mr. M. Pathmanathan was right in asking for costs in regard to the withdrawal of encl. 80 and he cited, *inter alia*, the following salient reasons:

(1) All the relevant affidavits have been filed and the defendants' previous counsel by the name of Madam DR John described the sale and purchase agreement of those shares with Kilang Bumi-Aluminium Sdn Bhd as a sham or a bogus transaction.

(2) Fulcrum was entitled to sell those shares based on the order of this court dated 22 August 2000. Even an appeal against that order would not operate as a stay; neither would the filing of encl. 80 operate as a stay.

(3) The affidavit in encl. 84 was a reply to encl. 83 and that affidavit (referring to encl. 84) contained unfair criticisms against Fulcrum's counsel as seen at paras. 5(d), 6(b), 6(c) and 6(d). These criticisms gave the impression that Fulcrum "had stolen a march on the defendants" by selling those shares. It was for these reasons that Fulcrum sought for an adjournment of the hearing of encl. 80 on 4 September 2000.

(4) Fulcrum through Lum Sing Fai affirmed an affidavit in reply in encl. 89 which was affirmed on 7 September 2000 and filed on the next day. Enclosure 89 was a rebuttal of encl. 84. Enclosure 89 exhibited all the relevant documents pertaining to the sale of those shares and the evidence of monetary payments on 30 August 2000 and 1 September 2000 would certainly counter all the unfair and unwarranted allegations by the defendants in encl. 84. There was a letter dated 5 September 2000 from Messrs Sri Ram & Co to Messrs Atma Singh Veriah & Co which was marked as exh. "LSF-1" of encl. 89 and it was worded in this way:

> We refer to the above matter and write to inform you that we are instructed by our clients that the 22,500,000 Merbok Hilir Berhad shares have been sold by our clients for a sum of RM67,275,000.00 which sum has been deposited with Arab-Malaysian Bank Berhad pending the opening of the stakeholders account in the joint names of Messrs Sri Ram & Co and Messrs Atma Singh Veriah & Co pursuant to the Order of the Court dated 22.8.2000 in respect of encl. 44.

> We propose to open the stakeholders account with Arab-Malaysian Bank Berhad and shall be obliged if you could kindly confirm your consent thereto.
>
> Upon receipt of your consent, we will arrange for the opening of account forms to be sent to you for your due execution.
>
> Kindly give this matter your urgent attention.

Then there was a letter from Fulcrum to Messrs Sri Ram & Co marked as exh. "LSF-2" of encl. 89 and it was worded in this way:

> We refer to the above matter.
>
> We write to inform you that we have received a sum of RM67,275,000.00 being the whole of the Purchase Price payable to us with respect to the abovementioned acquisition. The said Purchase Price has been placed in the money market/fixed deposit with Arab-Malaysian Bank Berhad pending the opening of a stakeholders account in the joint name of Messrs Sri Ram & Co and Messrs Atma Singh Veriah & Co, in accordance with the Order dated 22 August 2000. We will transfer the same to the said account together with any interest accrued therein immediately upon receiving notification that the said account has been opened and obtaining details of the same.

Again there was a letter from Fulcrum to Kilang Bumi-Aluminium Sdn Bhd marked as exh. "LSF-3" of encl. 89 and it was worded in this way:

> We refer to the above matter and to Clause 4.8 of the Agreement. Pursuant to the said Clause, we hereby write to inform you that we wholly waive the requirements of Clause 4.1 of the Agreement and forward with this letter our payment to you of the Balance Purchase Price in completion of the Agreement.
>
> Kindly acknowledge receipt of this letter and its enclosure.

In regard to the payments which Fulcrum received from the sale of those shares, the letter dated 5 September 2000 from Fulcrum to Kilang Bumi-Aluminium Sdn Bhd marked as exh. "LSF-4" of encl. 89 was self-explanatory and it was drafted in this fashion:

> We refer to your letter dated 4 September 2000 on the above matter and attached herewith copies of the Arab-Malaysian Bank Berhad's Credit Advice for Fulcrum Capital Sdn Bhd.
>
> The total Ringgit Malaysia received and the amount overpaid is computed below:
>
> | | |
> |---|---|
> | Received on 30/8/2000 | RM1,055,670.82 |
> | | RM5,696,193.04 |

Received on 1/9/2000	RM60,803,507.87
	RM67,555,371.73
Total consideration for Purchase	RM67,275,000.00
Excess payment	RM280,371.73
Stamping charges incurred	RM 40.00
Excess payment to be refunded	RM280,331.73

Would appreciate if you could advise us as to where the excess payment is to be paid to as soon as possible.

The defendants took exception to the fact that the final purchaser of those shares was not Tunku Jaafar Nong but Kilang Bumi-Aluminium Sdn Bhd and the letter dated 23 August 2000 from Tunku Jaafar Nong to Fulcrum marked as exh. "LSF 5" of encl. 89 explained the situation is this way :

I refer to the above and to my letter addressed to yourselves dated 18th May 2000 ('the said letter').

It is encouraging to have received news that the Court has granted the Order giving leave to yourselves to sell the Merbok shares.

Further to the above and to the said letter, please be informed that I hereby nominate KILANG BUMI SDN BHD to be the purchaser in the sale of the 29,250,000 Merbok shares for a total consideration of RM67,275,000.00 from yourselves.

As such, I would appreciate if you could proceed with the requisite documentation in order that we may finalise the sale as soon as practicable.

Thank you.

(5) Fulcrum's solicitors, namely, Messrs Sri Ram & Co were not responsible nor involved in the sale of those shares.

(6) When Fulcrum entered into the sale and purchase agreement to sell those shares to Kilang Bumi-Aluminium Sdn Bhd, the defendants did not apply nor did they have the benefit of any interim stay pending the hearing of encl. 80.

(7) Costs should follow the event since the defendants were withdrawing encl. 80.

(8) The withdrawal of encl. 80 was in itself an admission that the issues had become academic.

(9) As a successful litigant, Fulcrum should not be deprived of the fruits of their litigation.

(10) The question of sub-judice did not arise. There was no legal impediment for Fulcrum to sell those shares.

(11) The veracity of paras. 5(d), 6(b), 6(c) and 6(d) of encl. 84 need not be tested as these paragraphs were expressions of opinion, innuendoes, and mere wild allegations which were irrelevant, scandalous and oppressive and ought to be struck out forthwith.

In the final analysis, I struck out encl. 80 with costs. I too ordered that the offending paras. 5(d), 6(b), 6(c) and 6(d) of encl. 84 be expunged forthwith.

Enclosure 88 And 92 (The Hearing On 25 September 2000)

(1) Enclosure 88 was a summons in chambers filed by the defendants to injunct Fulcrum from selling those shares to Kilang Bumi-Aluminium Sdn Bhd and for the costs thereto to be borne by Fulcrum. At the outset, Mr. Christopher Leong for the defendants withdrew encl. 88. According to him the sealed copy of encl. 88 had yet to be served on Fulcrum.

Mr. M. Pathmanathan submitted that he had no objections to the withdrawal of encl. 88. He submitted that only the unsealed copy of encl. 88 was served on Fulcrum. He too pointed out that in regard to encl. 88 the court was moved on a certificate of urgency, but, nevertheless, he was not asking for costs.

Dato V. Sivaparamjothi agreed with the submissions of Mr. M. Pathmanathan and this court then struck out encl. 88 without costs.

(2) The defendants applied in encl. 92 by way of a summons in chambers for the following orders:

(a) That the Order of the court dated 25.8.2000 that the trial for the hearing of the preliminary issue fixed for 25.9.2000, 26.9.2000, 27.9.2000 and 29.9.2000 be stayed pending the determination of the defendants' appeal to the Court of Appeal, and

(b) That the costs of this application be costs in the cause.

and it was supported by an affidavit affirmed by A. Aziz bin Ismail on 20 September 2000 as seen in encl. 91. In response, Lum Sing Fai affirmed an affidavit in reply on 22 September 2000 and this can be seen in encl. 95. A. Aziz bin Ismail affirmed another affidavit in reply on 24 September 2000 which was filed on the next day and this can be seen in encl. 98. In short, encl. 98 was only filed this morning (meaning on 25 September 2000 at 8.51

a.m.). No wonder, Mr. M. Pathmanathan vehemently objected to encl. 98 being read in the course of adjudicating encl. 92. Mr. M. Pathmanathan informed this court that he was ready to proceed with the hearing of encl. 92 based entirely on encls. 91 and 95 only.

Mr. Christopher Leong submitted and it was his stand that encl. 98 should be read by this court in adjudicating encl. 92. He too submitted that if encl. 98 was excluded, then equally encl. 95 would also have to be excluded.

Mr. M. Pathmanathan responded and he submitted that the defendants moved encl. 92 on a certificate of urgency. He pointed out that encl. 92 together with encl. 91 were only filed on 20 September 2000 and served on the same day. He too pointed out that encl. 92 was scheduled for hearing this morning (referring to 25 September 2000). He submitted that Fulcrum rushed to prepare and file encl. 95 so that encl. 92 would be heard today (referring to 25 September 2000). All the same, Mr. M. Pathmanathan submitted that if the defendants insisted that encl. 98 be read in support of encl. 92, he had no choice but to seek for an adjournment to reply to encl. 98 and for this purpose he sought an adjournment for a few days.

Dato' V. Sivaparamjothi agreed with the submissions of Mr. M. Pathmanathan and he had nothing further to add.

Mr. Christopher Leong pointed out that the defendants have, in law, one month to file an appeal in respect of the order of this court dated 25 August 2000.

This court then informed all the parties as to what had transpired on 20 September 2000. I told them that on that date, at about 3.35 p.m., the senior assistant registrar in the person of Hajjah Wan Azizon binti Ahmad informed me that Mr. Christopher Leong requested for an early hearing date of encl. 92 before 25 September 2000. But since two clear days must be accorded under the RHC, I then gave today's date – referring to 25 September 2000 as the hearing date for encl. 92 for the purpose of enabling affidavit to be filed in response. When confronted with this piece of scenario, Mr. Christopher Leong agreed to what I have just said. He too agreed to have the hearing of encl. 92 adjourned to enable Mr. M. Pathmanathan to reply to encl. 98. He too sought for the hearing of the preliminary issue scheduled today – meaning 25 September 2000, be adjourned because, according to him, that would be the justice of the matter. Mr. Asmet for Rahaz Sdn Bhd simply adopted what Mr. Christopher Leong had said.

In reply, this was what Mr. M. Pathmanathan said. He submitted that if Mr. Christopher Leong insisted that encl. 98 to be read then this meant that there was no order for a stay of proceedings. He pointed out that this court had indicated to Mr. Christopher Leong that the trial of the preliminary issue would

proceed today – referring to 25 September 2000. He submitted that since the defendants were not ready to prosecute their application in encl. 92 today and the defendants were prepared to take an adjournment of encl. 92, he then urged this court to proceed with the trial of the preliminary issue as scheduled. Furthermore, so Mr. M. Pathmanathan submitted, there was no proper service of encl. 98 as it was handed over to the solicitors on record in the corridor of the court this morning. He further submitted that encl. 98 should be served on the office of Messrs Sri Ram & Co in regard to the Samsudin Action and on Messrs Iza Ng Yeoh & Kit in regard to the Rahaz Action. He stressed that the service of encl. 98 this morning at the corridor of the court was irregular.

In rebuttal, Mr. Christopher Leong submitted that the defendants were prepared to prosecute encl. 92. He pointed out that the issue of a possible settlement had been raised by Mr. M. Pathmanathan. He also pointed out that all parties in an urgent application were entitled to file and serve their respective affidavits in short strides. This was due, so he said, by the necessity of the very nature of the said application. He submitted that, in the interest of justice, in the event encl. 92 be heard today – referring to 25 September 2000, then all the affidavits filed would be relevant and ought to be read. Again, in the interest of justice, if Mr. M. Pathmanathan was interested in responding to encl. 98 he was amenable to this request provided the substantive application in encl. 92 was not rendered nugatory. It was the submission of Mr. Chrisotpher Leong that to order otherwise would be akin to closing the door of justice to the defendants.

Again, Mr. Asmet fully agreed and adopted the submissions of Mr. Christopher Leong.

Dato' V. Sivaparamjothi reiterated that on the last occasion this court had indicated to Mr. Christopher Leong that whatever costs the trial of the preliminary issue will proceed and that no adjournment would be entertained. He said that he was surprised at the attitude of Mr. Christopher Leong who at one instance was willing to adjourn encl. 92 but at the same time was also willing to proceed with encl. 92. That being the case, Dato' V. Sivaparamjothi urged this court to proceed with hearing of encl. 92 and to disregard encl. 98. But, if this court were to adjourn encl. 92, he submitted that the hearing of the preliminary issue should proceed forthwith as all the witnesses are available. It was his stand that Fulcrum took great pains in adhering to the directions of this court and he ventured to say that these witnesses ought not to be chased out by the court today.

Mr. M. Pathmanathan submitted that encl. 92 was filed at the eleventh hour with a view solely to delay the trial of the preliminary issue today (referring

25 September 2000). Using the case of *Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822 as an authority, Mr. M. Pathmanathan submitted that the defendants adopted a lackadaisical attitude in filing encl. 92 and the courts are generally loathe to assist parties who sit on their rights. It would be true to say that the courts will only assist the vigilant and not the indolent. Mr. M. Pathmanathan elaborated further. He emphasised that the defendants' time to appeal began on 25 August 2000 and the defendants sat on it until 25 September 2000 when encl. 92 was filed. Properly appraised he submitted that the delay must be construed against the defendants. But the delay must not be construed at the expense of Fulcrum. As alluded to earlier, the interest incurred was mounting at exactly RM34,000 per day and it was one of the considerations that this court granted an early trial of the preliminary issue as framed. He then submitted that encl. 92 be heard without reading encl. 98 or alternatively the hearing of encl. 92 be postponed to another day and the trial of the preliminary issue as framed be heard today – meaning 25 September 2000. He rightly submitted that to adjourn the hearing of encl. 92 it should not be at the expense of the trial today. He then drew my attention to the directive of the Honourable Chief Justice of Malaysia dated 10 April 2000 in regard to the question of adjournment. In that directive, the courts throughout the country have been directed not to accede to the request for an adjournment even if counsel were engaged in the Higher Courts including the Federal Court. He then urged me to give effect to the directive of the Honourable Chief Justice of Malaysia.

Mr. Christopher Leong submitted that Dato' V. Sivaparamjothi was not present in court on the last occasion but nevertheless he agreed that on the last occasion, this court had reminded them of the hearing of the preliminary issue as framed beginning today until the end of the month. Mr. Christopher Leong submitted that on the last occasion he had informed this court that he had just taken over the conduct of the matter and were in the midst of taking instructions which included, *inter alia*, the withdrawal of encl. 88 and the possibility of appealing against the order of this court dated 25 August 2000. At that point of time there was an uncertainty whether the order dated 25 August 2000 was by consent and he had informed this court that he needed to clarify the matter with Madam DR John and if the order dated 25 August 2000 was by consent then the defendants will not be entitled to lodge an appeal. He said that he had written to Madam DR John as well as to the courts for the notes of proceedings. Madam DR John had responded by letter dated 18 September 2000 as seen in exhibit marked "A6" of encl. 91 and there she said that the trial of the preliminary issue was not made with the consent of all parties. I shall in due course refer to this letter dated 18 September 2000. He then submitted that he was unable to obtain the notes of proceedings in view of the short span of time and since the time for filing the appeal was

coming to a close, he had no choice but to file an application for a stay in encl. 92 of the hearing of the preliminary issue as framed. He submitted that to proceed with the trial of the preliminary issue and at the same time postponing encl. 92 would make nonsense of encl. 92.

Again Mr. Asmet fully supported and adopted the submissions of Mr. Christopher Leong.

Dato' V. Sivaparamjothi took exception to what Mr. Christopher Leong had said. According to the said Dato' that even though he was absent on the last occasion, yet he was briefed by Mr. M. Pathmanathan as to what had transpired on that date.

Mr. M. Pathmanathan reiterated once again the circular of the Honourable Chief Justice of Malaysia. He rightly said that that circular was very clear. The Honourable Chief Justice of Malaysia had directed that no adjournments would be entertained. I am aware of the circular and I am bound by that circular. Enclosure 92 scheduled for today must proceed forthwith. The hearing of the preliminary issue scheduled today must also proceed till completion. That would be the effect of the circular of the Honourable Chief Justice of Malaysia. In *Gan Boon Kyee*'s case *(supra)*, the Court of Appeal described the five months delay in applying for an extension of time and a stay of the order as "leisurely paced" and Gopal Sri Ram JCA speaking for the Court of Appeal at p. 826 of the report aptly said:

> Further, she was entirely correct in classifying the conduct of the instant appellant as 'leisurely paced' because of the sluggish pace at which the appellant moved the court. It is axiomatic that the law assists the vigilant and not the indolent.

Likewise here the leisurely pace of the defendants in filing encl. 92 must be construed against them.

Mr. Christopher Leong held the view that he was prepared and ready for the hearing of encl. 92 today (referring to 25 September 2000) but he insisted that all the affidavits must be read thereto. He submitted that if Mr. M. Pathmanathan was asking for an adjournment for the reason of filing an affidavit in reply to encl. 98, then encl. 92 should be adjourned. He submitted that in the event encl. 92 was adjourned, he too would like the hearing of the preliminary issue scheduled today (referring to 25 September 2000) to be adjourned. He submitted that when encl. 98 was served today at the corridor of the court, there was no objection taken nor was there reservation made as to the mode of service. He submitted that in the interest of justice encl. 98 was served. He reiterated that in the event encl. 92 was to be heard, all the affidavits filed thereto must be read.

Mr. Asmet agreed and adopted the submissions of Mr. Christopher Leong.

Mr. M. Pathmanathan made a brief reply. He said that there was no reason for the contents of encl. 98 to be included in adjudicating encl. 92.

Having heard the submissions of the parties, I made the following orders:

(1) The hearing of encl. 92 supported by an affidavit in encl. 91 and a reply to that by way of an affidavit in encl. 95 to be heard today – meaning on 25 September 2000.

(2) In the course of hearing encl. 92, encl. 98 will not be read because it was only served on Fulcrum this morning – meaning 25 September 2000, at the corridor of the court at about 8.55 a.m. today (referring to 25 September 2000).

Before proceeding with the hearing of encl. 92, I granted a short adjournment on the request of Mr. Christopher Leong. At the resumed hearing, the parties proceeded to submit at length in regard to encl. 92.

Now, basically encl. 92 was in regard to a stay of the hearing of the preliminary issue as framed. The law journals are replete with authorities in regard to the issue of a stay. Suffice for this exercise that I shall refer to some of these authorities. For a start, I shall refer to the case of *Mohamed Mustafa v. Kandasami (No 2)* [1979] 2 MLJ 126 FC, a decision of Abdul Hamid J (who later rose to be the Lord President of the then Supreme Court) where at p. 127 his Lordship in fine language said:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. One of the determining factors that calls for consideration is whether by not making an order to stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

Next, it would be the case of *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd (supra)*, where NH Chan J (as he then was) said at p. 42 of the report:

> Discretion
>
> As for the discretion of the court on the granting or refusing of a stay, see *AG v. Emerson* [1889] 24 QBD 56. This is what Lord Esher MR said (at p 58):

> The real question is, what is the construction of this rule? It says: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the court appealed from may direct.' In all the rules the word 'may' has been held to mean 'may or may not.' It has been held to give a discretion, which is called a judicial discretion, but is still a discretion.
>
> In this country, the words in s. 73 of the Courts of Judicature Act 1964 are, 'unless the court ... so orders'. Plainly, this gives a discretion to the court. A judicial discretion, no doubt, which must be guided by proper rules founded on principle.

It would be followed by the case of *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 MLJ 105 SC, where the learned Federal Court Judge in the person of Edgar Joseph Jr FCJ (as he then was) in style said at p. 111 of the report:

> I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of the discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about. As long as one does not stray beyond the perimeter set by the judicial principles, the discretion can be exercised.

This would be followed by the decision of the Court of Appeal in the case of *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 where Gopal Sri Ram JCA at p. 609 of the report quoted with approval the speech of Kirby P in the case of *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42, 48 to this effect:

> In our opinion, it is not necessary for the grant of a stay that special or exceptional circumstances should be made out. It is sufficient that the applicant for the stay demonstrates a reason or an appropriate case to warrant the exercise of discretion in his favour.
>
> There are other principles to be kept in mind. The onus is upon the applicant to demonstrate a proper basis for a stay that will be fair to all parties: Trlin, above. The mere filing of an appeal will not, of itself, provide a reason or demonstrate an appropriate case, nor will it discharge the onus which the applicant bears. See the Supreme Court Rules, Pt 51 r 10; *Waller v Todorovic & Anor*. The court has a discretion whether or not to grant the stay and, if so, as to the terms that would be fair. In the exercise of its discretion, the court will weigh considerations such as the balance of convenience and the competing rights of the parties before it: *A-G v Emerson & Ors* [1889] 24

> QBD 56. Where there is a risk that if a stay is granted, the assets of the applicant will be disposed of, the court may, in the exercise of its discretion, refuse to grant a stay: cf *Clyne v Deputy Commissioner of Taxation* [1982] 56 ALJR 857.

In *Punca Klasik Sdn Bhd (supra)*, at p. 543 of the report, I said:

> Whichever approach I adopt, be it the *See Teow Guan* approach or that as propounded by Brown J in *Serangoon Garden Estate Ltd* which subsequently became entrenched in *Jasanusa* and *Dato' Hj Ghani Gilong*, the end result would be the same. In the exercise of my judicial discretion, there was no material demonstrated in the affidavit for a stay of the proceedings as sought for by the appellants.

Plainly it was a question of discretion whether I ought to grant a stay and the onus was entirely on the defendants to discharge. It would be apparent that the defendants were holding onto the notion that since there was an appeal pending before the Court of Appeal then the stay as applied in encl. 92 would be allowed. The defendants were simply unhappy that the preliminary issue as framed would be heard today (meaning 25 September 2000) until its final conclusion on 29 September 2000. The defendants argued that the trial of the whole action had been scheduled in late November 2000 and there was no necessity to expedite the trial of the preliminary issue in September 2000. But alas all these submissions of the defendants must be viewed in the light of the concessions by Madam DR John on 25 August 2000. Mr. M. Pathmanathan rightly submitted that:

> On 25 August 2000, I believe the record of the court will bear me out when DR John agreed that the preliminary issue is a valid and proper preliminary issue. However, she said that the same preliminary issue may be tried in November 2000. In the premises, it is not wrong to say that the order for the preliminary issue to be tried today until 29 September 2000 was by consent. The defendants have no objections in principle and their objections is as to the date of the trial of the preliminary issue scheduled today till 29 September 2000. In the premises, I submit that the defendants appeal is without merit and in bad faith and made solely to delay the trial and to scuttle today's hearing.

When Mr. Christopher Leong realised that Fulcrum was not governed nor dictated by the Moneylenders Act 1951, he quickly withdrew paras. 5(a)(iii), (iv) and (v) of encl. 91.

Mr. M. Pathmanathan was perfectly correct when he said that an appeal "has never been a reason or a ground to justify a stay of the proceeding or to bar a trial." This was a case where the defendants through Madam DR John consented to the trial of the preliminary issue knowing fully well that it was a cost saving device which was both expedient and efficacious. Mr. M. Pathmanathan continued further in his submission and he said that:

> I verily believe that the notes of proceedings on 25 August 2000 would show that DR John agreed that if the preliminary issue is answered in the negative it would put paid to the defence, *ie*, the Counter Claim.

I have since perused through the notes of evidence recorded by me for the session on 25 August 2000 and I found the following recital of what Madam DR John had said:

> I too agree that if the preliminary issue is answered in the negative it would put paid to the defence, *ie*, the Counter Claim.

Surely the notes of evidence as recorded by this court must reflect the reality of the matter. It was a verbatim recording of the oral submissions of the parties, a task which was arduous in the extreme. That is the truth of the matter. The truth always hurts. As Denis Diderot in "Le Neveu de Rameau" once said:

> We swallow greedily any lie that flatters us, but we sip only little by little at a truth we find bitter.

Arthur Schopenhauer in "The World As Will And Idea" aptly said:

> Life is short, but truth works far and lives long; let us speak the truth.

Paragraph 5(b) of encl. 91 alluded to the appeal that was lodged against the decision of this court dated 25 August 2000 which ordered the hearing of the preliminary issue in September 2000 and it was averred that that appeal would be rendered nugatory if the stay was not allowed. The nugatory approach must be viewed in the context of the consent by Madam DR John to have the preliminary issue tried by this court. It would be pointless to file an appeal against an event that was agreed upon by both parties.

In regard to para. 5(c) of encl. 91 where it was averred that Dato' Samsudin was "unable to attend and give evidence on any of the dates fixed for the trial of (the) preliminary issue" that was scheduled to proceed on 25 September 2000 till 29 September 2000, it was indeed a bald assertion with no material to support it. Mr. M. Pathmanathan took up the cudgel and he was displeased at the attitude of Dato' Samsudin. He submitted that Dato' Samsudin had on several occasions including today – meaning 25 September 2000, moved this court on certificates of urgency and at very short notice. He submitted that he had worked through the weekends to accommodate the defendants. He pointed out that Dato' Samsudin had filed many affidavits but when the real date of reckoning was fixed one month twenty-five days earlier, Dato' Samsudin snubbed the court and refused to proceed to trial. He rightly said that the wheel of justice cannot grind to a halt. He also rightly said that it is

not the norm nor the practice of the courts in fixing dates for hearing to ask the parties to revert to their witnesses to find out whether the dates are suitable. At best, counsel's date would be accommodated, within limits, by the courts.

Mr. M. Pathmanathan rightly pointed out that the trial of the preliminary issue was inevitable. It would serve no purpose to adjourn the hearing of the preliminary issue. In my judgment, the defendants would not suffer any prejudice if the stay was not granted. To allow the stay, would bring about unnecessary delay to the hearing of the preliminary issue, which delay would inevitably cause "manifest injustice to the parties" – to borrow the words of Gopal Sri Ram JCA in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors (supra)*.

Dato' V. Sivaparamjothi echoed the sentiments of Mr. M. Pathmanathan and this was what the said Dato' said:

> I was present when Y.A. framed the preliminary issue to DR John and she did indeed concede that the answer to the preliminary issue will substantially if not completely dispose of the issues pending before Y.A. Therefore, I am constrained to say that she did consent to the preliminary issue. In the circumstances, the intended appeal by the defendants lacked merit, totally unsustainable and it is doomed to failure. Therefore the question of nugatory is not applicable in this instance.

In regard to the special circumstances, the onus was on the defendants to show "something exceptional in character, something that exceeds or excels in some way that which is usual or common" (per Raja Azlan Shah J (as His Majesty then was) in *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86). But alas, the defendants failed to do so. In my judgment, the affidavit evidence in encl. 91 did not demonstrate anything "exceptional in character" to warrant a stay.

Mr. Christopher Leong, going on an uphill task, argued that apart from the preliminary issue as framed there was another issue which was related to the way the not happily worded letter was framed and he crystallised it in this way: whether the letter of demand is valid or otherwise? He then alluded to Madam DR John's letter marked as exh. "A6" of encl. 91, of which I have more to say later, and he said that he was not present when Madam DR John gave her consent to the preliminary issue to be heard today (meaning 25 September 2000) until 29 September 2000. He then submitted that if indeed Madam DR John gave her consent to have the preliminary issue heard today then the matter would have ended there and then. He then stressed that the defendants were happy to have the full trial in November, 2000.

Mr. Asmet merely adopted and supported Mr. Christopher Leong's submissions.

Mr. M. Pathmanathan then drew the court's attention to O. 33 r. 2 of the RHC and he said that Madam DR John agreed that this was an fit and proper case for the matter to be tried as a preliminary issue but she merely wanted the trial to be held in November, 2000. He submitted that the trial of the preliminary issue in September, 2000 made no difference at all nor would it caused prejudice to the defendants. Of significance was his submission that it would save cost and the preliminary issue if answered in the negative would dispose off the Counterclaim. Mr. M. Pathmanathan was very careful. He said:

> I stand by the notes of proceedings of 25 August 2000 and I therefore pray for encl. 92 to be dismissed with costs.

While Dato' V. Sivaparamjothi had nothing to add and he agreed fully to what Mr. M. Pathmanathan had said, Mr. Christopher Leong had this to say:

> I was not present on August 25, 2000 when the preliminary issue was framed and scheduled for hearing today and until September 29, 2000

Mr. Asmet also said that he was not present on 25 August 2000.

Now, the consent of Madam DR John to have the preliminary issue as framed to be heard would put encl. 92 to nought. Having agreed to the hearing of the preliminary issue as framed there was no substance at all for the defendants to apply for a stay. The hearing dates for the hearing of the preliminary issue between 25 September 2000 to 29 September 2000 to remain. Let it be known that these dates were fixed according to the court's calendar and not according to the whims and fancies of the parties nor their witnesses.

I will now proceed to examine the letter dated 18 September 2000 emanating from Messrs Atma Singh Veriah & Co – the law firm of Madam DR John, who acted for the defendants on 25 August 2000. That letter was addressed to Messrs Chooi & Co – the law firm of Mr. Christopher Leong, who currently acted for the defendants. That letter was marked as exh. "A6" of encl. 91 and the second, third and fourth paragraphs of that letter merit reproduction:

> We wish to register our shock that you were informed that the order for trial of the preliminary issue pursuant to order 33 Rule 2 of the Rule (of the) High Court 1980 was made with the consent of all parties.
>
> We wish to state categorically that our Ms. DR John Counsel for the Defendant and the Interveners **did not consent** for a trial of the preliminary issue and neither did she consent to the hearing of the matter to be brought forward to the 25, 26, 27 and 29 September 2000.
>
> In fact our Ms. DR John had objected strenuously at all material times to a trial of the preliminary issue and in fact informed the Court that she had no instructions to agree to a trial of the preliminary issue.

Other judges in like situation when confronted with these averments would immediately act and cite Madam DR John for contempt. Should I act in the same fashion? I have deliberated at great length and had toyed with the idea of citing Madam DR John for contempt when encl. 91 was filed on 20 September 2000. Alexander Pope in "An Essay On Criticism" once remarked:

> To err is human, to forgive, divine.

Shakespeare in the "Merchant of Venice" in classical style said "

> The quality of mercy is not strained
>
> It droppeth as the gentle rain from heaven.

The notes of evidence of the proceedings on 25 August 2000 clearly and unequivocally showed that Madam DR John had consented to the narrowing of the preliminary issue as framed and yet she had the audacity to write that kind of letter. Was she thinking that this is a lenient and merciful court who would not cite her for contempt? Was she testing the patience of this court when she wrote that letter? Mr. M. Pathmanathan, Dato' V. Sivaparamjothi and Mr. Manjit Singh were present during the proceedings on 25 August 2000 and they have heard Madam DR John consenting to the narrowing down of the preliminary issue as framed. The submissions of Mr. M. Pathmanathan and Dato' V. Sivaparamjothi as alluded to earlier supported the view that Madam DR John had consented to the narrowing down of the preliminary issue as framed.

It is a delicate relationship between a judge on the one hand and a counsel on the other hand. In whatever situation, the presiding Judge must maintain his authority in court. It was aptly said in *Re Prior, ex parte Bellanto* [1963] SR NSW 190 at 204 that:

> ... as well as protecting the rights of the Bar, equally every judge must be ready and fearless at all times to protect the courts in the important duties which they have to discharge against insult and unseemly behaviour which tends to obstruct the course of justice.

It was an insult to the intelligence of this court when Madam DR John wrote that letter. Lord Denning MR in *Balogh v. Crown Court at St Albans* [1975] QB73 at 86 gave a good guideline when he said:

> Insults are best treated with disdain – save where they are gross and scandalous.

But judicial tolerance will vary from judge to judge. The level of tolerance and the judicial sensitivity of the judge will definitely decide the fate of the incorrigible lawyer.

Ahmad Fairuz Sheikh Abdul Halim JCA (now FCJ) in *Zainur Zakaria v. PP* [2000] 4 AMR 4117 in a well written judgment referred to a number of authorities and it would be useful to refer to his Lordship's decision on the subject of contempt. His Lordship was of the view that it "was immaterial in the consideration of whether the contempt offence had been committed" "that the offender had any intention to interfere with the course of justice" (see p. 4137 at column 35 to 40 thereof). If Madam DR John said that she had an "honest intention" to write that letter, this too cannot constitute a defence "to a contempt of court charge". His Lordship Ahmad Fairuz Sheikh Abdul Halim JCA (now FCJ) said at p. 4138 of the report:

> But before we leave this subject, we would like to refer to the case of *Attorney-General Malaysia v. Manjeet Singh Dhillon* [1991] 1 MLJ 167. The learned Attorney-General in that case contended that the respondent's honest intention was no defence to a contempt of court charge. He referred to the case of *Yusof Ali Khan v. State* PLD 970 SC 350 wherein Hamoodur Rahman C.J., *inter alia*, said –
>
> > No one can be allowed to defame, ridicule or abuse a judge in his public capacity even with the best of motives because if that sort of thing were once held to be permissible the whole judicial system would readily be brought into utter contempt.
>
> After referring to this and several other authorities, Mohamed Yusoff SCJ, said at page 180:
>
> > On this basis I would accept the Attorney-General's contention as a proper statement of the law.

Even if Madam DR John turned around and said that she wrote that letter on Dato' Samsudin's instructions, that would not exculpate her (see Ahmad Fairuz Sheikh Abdul Halim JCA (now FCJ) judgment at p. 4139 to p. 4140 of the report of the same case). For the time being, my levels of "judicial tolerance" and "judicial sensitivity" are on the high side. I cannot say that it would remain constant and unchanging in the near future. Only time will tell.

Of recalcitrant lawyers, I need to quote what Thomas More said in "Utopia":

> They have no lawyers among them (in Utopia) for they consider them as the sort of people whose profession it is to disguise matters.

and I have nothing to add as these words strike a chord of harmony when read in the context of that letter as seen in exh. "A6" of encl. 91.

In the meantime, I dismissed encl. 92 with costs.